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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

— — —

THE HONORABLE GEORGE C. HANKS, JR., JUDGE PRESIDING

USA, No. 4:21-CR-00009-1

Plaintiff,

vs.

ROBERT T. BROCKMAN,

Defendant.

COMPETENCY HEARING -- DAY 3 AM SESSION

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS

Houston, Texas

WEDNESDAY, NOVEMBER 17, 2021

APPEARANCES:

For the Plaintiff: COREY J. SMITH, DOJ

CHRISTOPHER MAGNANI, DOJ

LEE F. LANGSTON, DOJ

BORIS BOURGET, DOJ

For the Defendant: JASON S. VARNADO, ESQ., Attorney
at Law

COLLEEN O'CONNOR, ESQ., Attorney
at Law

JAMES P. LOONAM, ESQ., Attorney
at Law

KATHRYN KENEALLY, ESQ., Attorney
at Law

For the
Interpreter: n/a

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Southern District of Texas
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Proceedings recorded by mechanical stenography.
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SEAN W. GUMM, CSR #13168, RPR, CRR

PROCEEDINGS

(The following proceedings held in open court.)

* * *

WEDNESDAY, NOVEMBER 17, 2021 -- 8:32 A.M.

--oOo--

THE COURT: Good morning and welcome back. Before we get started, I did receive the motion from -- I mean Dr. Yudofsky's counsel. Is he present?

MR. MACDOUGALL: Yes, Your Honor.

THE COURT: If you'd like to approach, sir. Good morning.

MR. MACDOUGALL: Good morning, Your Honor. Mark MacDougall for Dr. Yudofsky.

THE COURT: Good morning. I received your motion. I just wanted to make sure I understand what you are asking. You are asking the Government to call your client tomorrow?

MR. MACDOUGALL: Your Honor, actually asking he be called today, which was the promised date, the date we were given notice of last week, and that we had inquired of the Government, and the Defense the week before in a letter, which is

08:33:38 1 attached to the motion. May I remove my mask?

08:33:41 2 THE COURT: Oh, yes. I'm sorry. You
08:33:42 3 weren't here for the rules. When addressing the
08:33:45 4 Court or at podium you don't have to wear your mask.

08:33:48 5 Um, have you talked to counsel on
08:33:51 6 both sides about this, and talked about where they
08:33:53 7 are and what's going on?

08:33:55 8 MR. MACDOUGALL: My colleague,
08:33:56 9 Mr. Petree, spoke to Government counsel last night,
08:34:00 10 and nothing definitive came of that discussion.
08:34:03 11 They are uncertain that apparently cross-examination
08:34:06 12 -- haven't been in court, so I'm speaking from
08:34:09 13 hearsay, but the cross-examinations have gone much
08:34:12 14 longer than thought. I understand that and that's
08:34:14 15 how it goes, but Dr. Yudofsky realigned patient
08:34:18 16 schedules, travel and so forth to be here today as
08:34:20 17 required. And to be told yesterday afternoon that
08:34:23 18 maybe Thursday -- and we're not even sure about
08:34:25 19 that -- is difficult, given the fact we brought this
08:34:29 20 up as early as September.

08:34:30 21 THE COURT: Okay. Counsel from both
08:34:32 22 sides, you have any -- weigh in on this?

08:34:36 23 MR. LANGSTON: We do.

08:34:37 24 THE COURT: First of all, you guys have
08:34:38 25 been working extremely hard. You haven't been here,

08:34:41 1 Mr. MacDougall, but they've been here every morning
08:34:45 2 at nine o'clock and staying until six o'clock the
08:34:48 3 last two nights. Nobody's wasting time.

08:34:51 4 Everybody's moving as quickly and thorough as they
08:34:54 5 can. Nobody has been wasting time with witnesses,
08:34:57 6 and the witnesses have been very forthcoming with
08:35:04 7 answers. It's not their fault, just the schedule.

08:35:06 8 I'm wondering --

08:35:09 9 MR. LANGSTON: We have discussed it,
08:35:10 10 Your Honor, and we don't think -- just based on the
08:35:12 11 other witnesses that also have conflicts, we just
08:35:17 12 don't think it's likely to happen today, given --
08:35:19 13 you know, we did tell them Wednesday. That was our,
08:35:22 14 you know, best estimate. As with all of the other
08:35:25 15 witnesses we've been giving up dates as we learn
08:35:28 16 them, and as we sort of saw how long Dr. Denney was
08:35:31 17 taking yesterday we gave the update.

08:35:33 18 I don't think it can happen
08:35:35 19 Wednesday. That was the first we learned that there
08:35:37 20 was a conflict on Thursday. You know, we're not --
08:35:40 21 just to be clear from what the motion said, there is
08:35:42 22 no pattern of harassment here. We're not trying to,
08:35:45 23 you know, drag Dr. Yudofsky --

08:35:47 24 THE COURT: Everybody's in the same
08:35:48 25 boat. We've got lots of doctors that are

08:35:50 1 testifying.

08:35:51 2 MR. LANGSTON: Quite frankly, I just
08:35:53 3 don't -- given the schedule that we have today and
08:35:55 4 the witnesses that are already lined up, I just
08:35:57 5 don't think it can happen today.

08:35:59 6 THE COURT: Can it happen tomorrow?

08:36:00 7 MR. LANGSTON: Yes.

08:36:01 8 THE COURT: Because after we get this
08:36:02 9 witness off, we can call him out of order. I don't
08:36:05 10 know how long this witness is going to be on the
08:36:07 11 stand.

08:36:07 12 MR. LANGSTON: So I think we can call
08:36:12 13 him tomorrow.

08:36:12 14 THE COURT: Best we can do tomorrow. I
08:36:14 15 know Dr. Yudofsky has travel plans, but the quickest
08:36:17 16 we can get to him is tomorrow. We've already
08:36:19 17 interrupted this witness's testimony to call in
08:36:21 18 another witness to accommodate schedules. There's
08:36:25 19 no way to get Dr. Yudofsky on the stand until
08:36:28 20 tomorrow.

08:36:30 21 MR. MACDOUGALL: I appreciate that,
08:36:31 22 Your Honor. If I may respond to the Government
08:36:33 23 briefly?

08:36:33 24 THE COURT: Sure.

08:36:34 25 MR. MACDOUGALL: Dr. Yudofsky is a

08:36:35 1 stranger to this case. He's a third-party under a
08:36:40 2 Rule 17 subpoena. As I understand it, the majority
08:36:42 3 of the other witnesses are paid experts that
08:36:44 4 Government, and later the Defense control.

08:36:46 5 So, you know, taking Defense
08:36:48 6 witnesses out of order because they have travel
08:36:50 7 plans or anything is -- I would suggest it's not
08:36:53 8 entirely fair to Dr. Yudofsky given his position,
08:37:00 9 vis-à-vis the parties. If tomorrow is tomorrow, I
08:37:01 10 appreciate the Court's time.

08:37:02 11 THE COURT: Not a problem. As you
08:37:04 12 pointed out in your brief, I did say that we would
08:37:06 13 do our best to accommodate everyone's schedule,
08:37:10 14 which we're doing, but it sounds like the quickest
08:37:12 15 we can call him is tomorrow.

08:37:14 16 I mean, can we get -- assuming that
08:37:16 17 this witness is done -- I think we're pretty nearing
08:37:21 18 the end -- should be. I mean, maybe not exactly,
08:37:24 19 but it's not going to take all day.

08:37:26 20 MR. LANGSTON: I don't anticipate
08:37:28 21 Dr. Denney will take all day, or at least I'm surely
08:37:32 22 hoping. But we do have -- the Defense has said they
08:37:34 23 have another witness we do have to take out of
08:37:36 24 order, which is another doctor only available today.

08:37:40 25 We have witnesses with

08:37:41 1 international flights who have been sitting around,
08:37:44 2 you know, for a week that are also lined up. I
08:37:46 3 mean, we have tried to look at the schedule and, you
08:37:49 4 know, we are trying to accommodate everyone. But I
08:37:52 5 just don't think it can happen today.

08:37:54 6 THE COURT: Okay. Can it happen
08:37:55 7 tomorrow?

08:37:56 8 MR. LANGSTON: Yes. We are willing to
08:37:58 9 -- are willing to readjust the schedule tomorrow,
08:38:02 10 and I think there's flexibility. But in terms of --
08:38:04 11 you know, as I said last night, there was an e-mail
08:38:06 12 inbox full of people that had conflicts and we're
08:38:09 13 trying to arrange them as best we can.

08:38:10 14 THE COURT: Can you explain,
08:38:12 15 Mr. MacDougall -- I mean to Dr. Yudofsky that the
08:38:15 16 best we can do is tomorrow? I will get him on the
08:38:18 17 stand tomorrow. How long it will take just depends
08:38:20 18 on the questioning, but we'll get him on the stand
08:38:25 19 tomorrow.

08:38:25 20 MR. MACDOUGALL: I appreciate that,
08:38:26 21 Your Honor. If I could just briefly ask the Court
08:38:27 22 to inquire of the Government do they have a time
08:38:30 23 estimate morning/afternoon -- something we can work
08:38:33 24 with for tomorrow?

08:38:35 25 THE COURT: Sure.

08:38:36 1 MR. LANGSTON: We can work with
08:38:37 2 Dr. Yudofsky's schedule when he would prefer to do
08:38:40 3 it. I can give an update, you know, as we see how
08:38:43 4 the testimony goes. Obviously if there's a witness
08:38:46 5 still on the stand at five o'clock, probably want to
08:38:48 6 finish them, but happy to make him the first witness
08:38:50 7 called tomorrow if that's what they want.

08:38:52 8 If they rather him testify in the
08:38:53 9 afternoon, we can arrange that, too.

08:38:55 10 MR. MACDOUGALL: As soon as possible,
08:38:57 11 Your Honor. Thanks very much.

08:38:58 12 THE COURT: Not a problem. Thank you,
08:38:59 13 sir.

08:39:01 14 MR. VARNADO: Your Honor, I was going
08:39:03 15 to mention that as Mr. Langston said, we do have a
08:39:05 16 doctor here today that the Government agreed to call
08:39:08 17 out of order. We'll address that, and see whenever
08:39:11 18 Dr. Denney finishes his testimony.

08:39:13 19 I know Mr. Langston raised issue at
08:39:16 20 the close of court yesterday. I know counsel for
08:39:18 21 the UCSH just asked me to mention they were here in
08:39:21 22 the courtroom and ready to address that if the Court
08:39:23 23 wanted to take it up.

08:39:24 24 THE COURT: Okay. Great.

08:39:25 25 MR. LANGSTON: We're ready to address

08:39:27 1 it now if they prefer. We sort of asked them for
08:39:29 2 more information by the lunch hour today.

08:39:31 3 THE COURT: Do we need it for this
08:39:33 4 cross?

08:39:33 5 MR. LANGSTON: We don't need it for
08:39:34 6 this cross.

08:39:35 7 THE COURT: Then let's get going. I
08:39:36 8 wanted to start earlier to get a little more
08:39:39 9 testimony in. During the break we'll just not -- I
08:39:43 10 guess the witnesses and I will take a break. During
08:39:46 11 this morning's break, we won't take as long a break,
08:39:49 12 and we'll talk about it then.

08:39:51 13 I just want to get the witnesses
08:39:53 14 off and on as quickly as we can. As I said, I'm not
08:39:56 15 criticizing anyone's examination or
08:39:58 16 cross-examination. You guys are doing a great job.
08:40:00 17 It's just just I want to make sure that parties
08:40:02 18 aren't inconvenienced unnecessarily.

08:40:05 19 So your witness.

08:40:07 20 MR. LOONAM: Thank you, Your Honor.

21 **ROBERT DENNEY,**

22 **(For the Government)**

23 having previously been called as a
24 Witness, and having already been duly and regularly
25 sworn, continued to testify as follows:

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08:40:11

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CROSS-EXAMINATION RESUMED

08:40:11

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BY MR. LOONAM:

08:40:14

4

Q. Good morning, Dr. Denney.

08:40:16

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A. Good morning.

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THE COURT: Good morning, Dr. Denney.

08:40:21

7

Sorry kind of talking around you. Welcome back,

08:40:24

8

sir.

08:40:24

9

THE WITNESS: Thank you.

08:40:33

10

MR. LOONAM:

08:40:33

11

Q. You heard Dr. Darby testify on direct about the

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collaboration amongst the Government's experts in

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this case; correct?

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14

A. Yes.

08:40:48

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Q. And did you collaborate with doctors Darby and

08:40:52

16

Dietz in this matter?

08:40:54

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A. We collaborated in the process of the

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evaluation early on, how it went. I did not share

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reports with them or collaborate in any kind of way

08:41:06

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on reports.

08:41:07

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Q. Did you share information amongst the group?

08:41:10

22

A. Yes. As that information came in, yes.

08:41:13

23

Q. And are you aware that Dr. Darby interviewed

08:41:21

24

Dorothy Brockman in this matter?

08:41:23

25

A. Yes.

08:41:24 1 Q. And did you obtain that information to include
08:41:29 2 in your first report?

08:41:32 3 A. I did.

08:41:34 4 Q. Now, yesterday on direct you provided the
08:41:38 5 following testimony. And this is from a rough
08:41:43 6 transcript. So if it differs, let me know from your
08:41:46 7 memory, but.

08:41:47 8 "Question: Let me ask you about your
08:41:51 9 evaluations of Mr. Brockman, Dr. Denney. Normally,
08:41:55 10 when you perform an evaluation like this of a
08:41:57 11 defendant in a criminal case, or any subject, do you
08:42:01 12 normally seek to interview people close to the
08:42:04 13 subject to get a recording of their observations of
08:42:08 14 the subject?

08:42:09 15 "Answer: Yes, I do.

08:42:12 16 "Question: Did that happen in this
08:42:14 17 case?

08:42:15 18 "Answer: No.

08:42:17 19 "Question: You didn't talk to
08:42:19 20 anybody close to Mr. Brockman?

08:42:21 21 "Answer: No, I did not.

08:42:25 22 "Question: Why not?

08:42:27 23 "Answer: Well, I wanted to. We had
08:42:31 24 talked about the possibility of us being able to do
08:42:33 25 that, and I was told that they -- those -- for

08:42:38 1 example, Mrs. Brockman chose not to be interviewed
08:42:47 2 by me.

08:42:48 3 "Question: So that was not your
08:42:49 4 choice not to interview anybody?

08:42:50 5 "Answer: No."

08:42:52 6 Do you recall this testimony?

08:42:53 7 **A.** Yes.

08:42:53 8 **Q.** And the substance of what I reported to you
08:42:57 9 forms with your recollection of your testimony from
08:42:59 10 yesterday?

08:42:59 11 **A.** Yes, it does.

08:43:04 12 **Q.** We just discussed Dorothy Brockman, who was
08:43:06 13 interviewed by Dr. Darby. Who -- who were you
08:43:09 14 prevented from interviewing?

08:43:17 15 **A.** Well, Mrs. Brockman specifically. I know that
08:43:21 16 early on there were discussions of -- of trying to
08:43:24 17 interview other people that were close to
08:43:29 18 Mr. Brockman in his life. I don't remember the
08:43:33 19 exact specifics, but none of that panned out, in
08:43:37 20 that we were not able to do that. So I was not able
08:43:43 21 to interview any other people that would be close to
08:43:45 22 him.

08:43:46 23 **Q.** I don't understand. So in your testimony
08:43:48 24 yesterday you said Dorothy Brockman was a -- an
08:43:52 25 example of somebody who you were prevented

08:43:57 1 interviewing. Dr. Darby, who you collaborated with,
08:43:58 2 interviewed Mrs. Brockman and shared that
08:43:59 3 information with you. Can you name a specific
08:44:01 4 person that you tried to interview, and that you
08:44:03 5 were prevented from interviewing?

08:44:07 6 **A.** Mrs. Brockman.

08:44:09 7 **Q.** In your testimony, you describe Mrs. Brockman
08:44:12 8 as an example, and the testimony was about anybody
08:44:18 9 close to Mr. Brockman. And then it concluded with,
08:44:22 10 "So that was not your choice not to interview
08:44:25 11 anyone?"

08:44:26 12 And you said, "No."

08:44:29 13 So your testimony was you were
08:44:31 14 prevented from interviewing anyone close to
08:44:33 15 Mr. Brockman. I'm just asking you, name one person
08:44:37 16 that you were prevented from interviewing, other
08:44:40 17 than Dorothy who you are -- you are -- your
08:44:42 18 collaborator, Dr. Darby, shared the substance of the
08:44:46 19 interview with you. So who were you prevented from
08:44:48 20 interviewing?

08:44:49 21 **A.** Well, we had talked about -- now I have to dig
08:44:53 22 deep into my recollection, because it's been awhile
08:44:56 23 on this issue. We had talked about -- my
08:45:03 24 understanding, my recollection, is that we talked
08:45:04 25 about --

08:45:07 1 Q. Who is "we?" I'm sorry, just for foundation.

08:45:10 2 A. Oh, myself, Dr. Dietz, the attorneys involved

08:45:17 3 -- they were asking us -- the attorneys were asking

08:45:20 4 us what sort of things we wanted to review, people

08:45:23 5 we wanted to talk to. And we were brainstorming --

08:45:27 6 Q. Let me stop you, because the Government has
08:45:29 7 asserted work product protection. So I want to make
08:45:35 8 sure I'm not intruding on work product here?

08:45:38 9 MR. COREY SMITH: That's fine. He can
08:45:40 10 answer this question.

08:45:42 11 MR. LOONAM:

08:45:42 12 Q. Okay.

08:45:43 13 A. We talked about several people trying to be
08:45:46 14 available, and who would be able to describe what
08:45:49 15 Mr. Brockman was like in his daily life. My
08:46:02 16 recollection was we weren't able to interview any of
08:46:04 17 those people.

08:46:05 18 Q. So did you, yourself, try to reach out to
08:46:12 19 anyone to try to conduct a collateral interview in
08:46:14 20 this matter?

08:46:15 21 A. No, I was -- it was communicated to me to the
08:46:17 22 attorneys that -- that the Defense said no.

08:46:22 23 Q. Who communicated that to you?

08:46:24 24 A. I don't recall specifically who it was.

08:46:26 25 Q. Are they sitting --

08:46:28 1 **A.** It was a telephone call. It was one of the
08:46:30 2 team. I don't remember who it was.

08:46:31 3 **Q.** And somebody communicated to you from this
08:46:34 4 table -- one of these gentlemen, one of these
08:46:37 5 lawyers from the Department of Justice communicated
08:46:40 6 that you couldn't conduct any collateral interviews
08:46:43 7 because the Defense said no?

08:46:46 8 **A.** That's the essence of it, yes.

08:46:56 9 **Q.** You were asked yesterday about whether you
08:46:58 10 interview anybody close to the subject. You didn't
08:47:00 11 seek to establish interviews yourself directly. You
08:47:03 12 went through the prosecutors, and the prosecutors
08:47:05 13 said, "No, you can't conduct those collateral
08:47:08 14 interviews"?

08:47:09 15 **MR. COREY SMITH:** Objection. That's
08:47:10 16 not what he said.

08:47:11 17 **THE COURT:** Objection's sustained.

08:47:12 18 **MR. LOONAM:**

08:47:13 19 **Q.** The prosecutors said the Defense said you can't
08:47:15 20 conduct those collateral interviews?

08:47:17 21 **A.** It was communicated to me that -- and my
08:47:21 22 recollection is it was communicated to me through
08:47:26 23 the Government witnesses from the Defense -- to the
08:47:30 24 Government attorneys from the Defense attorneys who
08:47:34 25 I -- the impression was contacted individuals and

08:47:38 1 told us that, no, that was not going to happen.

08:47:43 2 Q. So -- so if -- well -- and you don't recall any
08:47:48 3 of the people that you are talking about?

08:47:51 4 MR. COREY SMITH: I'm going to object
08:47:52 5 at this point, Your Honor. If counsel wants an
08:47:54 6 offer of proof of the conversations prosecutors had
08:47:57 7 with Defense counsel, we can do that at sidebar.
08:48:00 8 We're happy to represent to the Court the
08:48:02 9 conversations we had with Defense counsel, but this
08:48:04 10 witness is not competent to testify to these
08:48:05 11 questions. He was not party to those conversations.
08:48:08 12 Those were conversations between Prosecutor and
08:48:09 13 Defense, and we're happy to tell the Court what
08:48:12 14 those were at sidebar.

08:48:13 15 THE COURT: Okay.

08:48:14 16 MR. LOONAM: Your Honor, Ms. Keneally,
08:48:16 17 you can talk about that. But my -- look, this
08:48:18 18 witness -- first of all, I'm just asking for his
08:48:23 19 efforts to conduct collateral interview. I'm not
08:48:25 20 asking about conversations between Prosecution and
08:48:28 21 anyone on the Defense team. So I'm not certainly
08:48:31 22 asking about those communications, and will not ask
08:48:33 23 about those communications.

08:48:34 24 But this witness testified that he
08:48:36 25 normally conducts interviews of people close to the

08:48:41 1 Defendant. I'm asking who he attempted to
08:48:46 2 interview. I haven't gotten an answer as to who
08:48:48 3 that was.

08:48:50 4 This case has been going on for a
08:48:52 5 long time. There were two evaluations, two reports.
08:48:56 6 And I have to breakdown by time period who -- when
08:48:59 7 he attempted to do this. So there's more to talk
08:49:02 8 about on this subject.

08:49:03 9 MR. COREY SMITH: I think he's answered
08:49:04 10 the question, Your Honor. He's been told by
08:49:07 11 Prosecution -- we inquired if he could interview
08:49:12 12 some of the people close to Mr. Brockman. We were
08:49:13 13 told no. He conveyed that. He's testified to that
08:49:16 14 already. The question's been asked and answered.

08:49:18 15 Any more detail involves
08:49:20 16 communications between Prosecution and Defense. As
08:49:22 17 I said, we're happy to offer an offer of proof of
08:49:24 18 what we were told by counsel, but I don't think it's
08:49:27 19 appropriate -- he already answered the question
08:49:29 20 twice.

08:49:29 21 THE COURT: Yeah. I mean, he says that
08:49:31 22 he asked to interview people close, and the
08:49:35 23 prosecutors told him that they asked the defense
08:49:37 24 team, and the defense team told him no.

08:49:39 25 So what more can he say?

08:49:41 1 MR. LOONAM: No, that's fine. I guess
08:49:43 2 I was curious as to whether -- you know, is it your
08:49:45 3 normal practice to go through the -- the -- the
08:49:49 4 prosecution when you are conducting these interviews
08:49:51 5 or reach out on your own to try --

08:49:53 6 THE COURT: But how could he -- I mean,
08:49:55 7 your whole argument in this case is that he's the --
08:50:00 8 he's the Prosecution expert, so if he's
08:50:05 9 Prosecution's expert how could he go directly to the
08:50:07 10 witnesses and ask them for an interview?

08:50:10 11 MR. LOONAM: That's fine, Your Honor.

08:50:11 12 THE COURT: I'm not --

08:50:12 13 MR. LOONAM: No, look -- that's -- I
08:50:14 14 guess the -- that's fine, Your Honor.

08:50:16 15 THE COURT: Okay. Well, I don't mean
08:50:18 16 to interrupt your cross-examination. I'm just
08:50:20 17 trying to figure this out. Because you are saying
08:50:22 18 that he's their expert, so you know if he's their
08:50:28 19 expert, he's gotta go through Prosecution to
08:50:32 20 interview anyone, otherwise he'd -- I don't know how
08:50:35 21 you'd do it if --

08:50:38 22 MR. LOONAM: Fair enough. I just --
08:50:39 23 fair enough. I -- I assumed you could reach out to,
08:50:42 24 you know, other doctors or collateral witnesses who
08:50:46 25 aren't part of the immediate family.

08:50:48 1 But that's -- you know, maybe there
08:50:50 2 were instructions that -- and so if -- if you were
08:50:55 3 given an instruction, you couldn't talk to people
08:50:57 4 and conduct collateral interview I understand.

08:51:03 5 Q. Okay. In your supplemental -- well, in your
08:51:14 6 supplemental report, you indicate that
08:51:21 7 Mr. Brockman's caretaker, Mr. Gutierrez, may not be
08:51:26 8 -- I think it's unsullied?

08:51:31 9 A. I did use that term in regards to Mr. Gutierrez
08:51:34 10 and Mrs. Brockman.

08:51:39 11 Q. So what's your basis to believe that
08:51:43 12 Mr. Brockman's caretaker, Mr. Gutierrez, is not
08:51:48 13 unsullied?

08:51:53 14 A. Well, they're very close to Mr. Brockman. And
08:51:55 15 for him specifically, he works for Mr. Brockman.
08:51:58 16 And asked -- or asking information from him
08:52:06 17 regarding the objective characteristics of
08:52:09 18 Mr. Brockman may -- in no disrespect to him, but he
08:52:16 19 probably -- I would expect him to have a bias
08:52:22 20 regarding Mr. Brockman, given the fact that he works
08:52:25 21 for him. It's his employer, and he is intimately
08:52:30 22 involved with him every day.

08:52:33 23 Q. Well, I mean --

08:52:37 24 A. So that's not to rule out talking with him. I
08:52:40 25 mean, that the information could be helpful. But

08:52:44 1 I'm just saying because he's, in essence, a part of
08:52:48 2 the family, and that's a part of the whole -- the
08:52:53 3 outcome would make a difference to him and the
08:52:56 4 family in this overall case. So that does not make
08:53:01 5 him a completely objective and independent
08:53:04 6 individual. That's all I'm saying.

08:53:05 7 **Q.** Well, when you are conducting these -- the
08:53:09 8 collateral interviews, do you -- do you ever find a
08:53:12 9 completely objective individual with somebody who
08:53:14 10 has detailed knowledge of a defendant?

08:53:18 11 **A.** There are -- it's on a spectrum. There are
08:53:21 12 those who are less objective, because they're
08:53:23 13 tighter and closer into the situation. There are
08:53:26 14 those less affected by the outcome of the case that
08:53:30 15 would be potentially less biased.

08:53:33 16 Maybe those would be other people
08:53:35 17 who worked with Mr. Brockman, or who spent time with
08:53:43 18 him in different settings but were not in some way
08:53:45 19 or another involved as -- not necessarily as a party
08:53:50 20 in the case, but ancillary to a party in the case.

08:53:56 21 **Q.** Okay. Sounds like a bit of a Catch-22, because
08:54:00 22 anyone with detailed knowledge of the Defendant is
08:54:03 23 potentially biased?

08:54:04 24 **A.** Well, I mean to some degree that's somewhat
08:54:07 25 true, but as a forensic evaluator I have to judge

08:54:11 1 that when I'm interviewing the person and gauge that
08:54:15 2 issue as best I'm able to do.

08:54:21 3 Q. Do you agree saying somebody, you know, may not
08:54:24 4 be unsullied is -- but assuming a willingness to
08:54:38 5 misrepresent that may not exist?

08:54:42 6 A. If I recall, I said may.

08:54:44 7 Q. Yeah, I think that's question, may be
08:54:46 8 unsullied.

08:54:47 9 A. I mean no disrespect from that. And maybe
08:54:49 10 that's not a -- maybe that was somewhat of a
08:54:52 11 derogatory term. I did not intend it to be.

08:54:54 12 Q. Yesterday we were discussing the stand-alone
08:54:59 13 validity tests developed by Dr. Paul Green; correct?

08:55:03 14 A. Yes.

08:55:04 15 Q. Those are the Word Memory Tests, or WMT; the
08:55:08 16 Non-Verbal Medical Symptom Validity Test, or
08:55:15 17 NV-MSVT; and the Medical Symptom Validity Test, or
08:55:17 18 MSVT; correct?

08:55:18 19 A. Yes.

08:55:24 20 Q. These tests were developed to distinguish
08:55:27 21 between individuals exaggerating their symptoms,
08:55:31 22 versus individuals that are truly impaired; correct?

08:55:38 23 A. Not exactly. I mean, they're to identify
08:55:43 24 exaggeration, and that's what -- that's what they
08:55:48 25 do. Again, with any free-standing validity test,

08:55:53 1 it's designed to be -- have a low false positive
08:56:02 2 rate. So positive scores are very meaningful, and
08:56:05 3 negative scores are not very meaningful. The thing
08:56:08 4 that's unique about these tests is that they have
08:56:10 5 patterns that help you better determine -- to rule
08:56:14 6 out a possible cognitive problem contributing to
08:56:19 7 that positive finding.

08:56:20 8 Q. I'll get there with my questions. Let's go
08:56:23 9 step-by-step, because I want to make sure everyone's
08:56:26 10 following what these are. I'm going to ask that
08:56:28 11 question again, because I think -- I think you
08:56:30 12 agreed with the question in your answer, but these
08:56:33 13 tests were developed to distinguish between
08:56:36 14 individuals exaggerating their symptoms, versus
08:56:39 15 individuals who were truly impaired; correct?

08:56:45 16 A. Mostly correct. It's more complicated than
08:56:50 17 that. I'm sorry, but it's more complicated than
08:56:53 18 that.

08:56:53 19 Q. And research has demonstrated that individuals
08:56:58 20 suffering from dementia are at increased risk of
08:57:01 21 receiving a false positive indication of
08:57:04 22 exaggerating on performance validity tests; correct?

08:57:08 23 A. Yes, if those cutoffs are not adjusted to deal
08:57:13 24 with this -- the pathology that's suspected.

08:57:17 25 Q. The Green tests -- the tests developed by

08:57:21 1 Dr. Paul Green have various decision rules that have
08:57:29 2 been built in to a mathematical algorithm that is
08:57:33 3 designed to discriminate between individuals with
08:57:36 4 genuine memory impairment, and individuals showing
08:57:40 5 poor effort and exaggerating their symptoms;
08:57:44 6 correct?

08:57:44 7 **A.** Yes, and those rules are a part of an
08:57:47 8 interpretive step-by-step process.

08:57:50 9 **Q.** We're going to walk through -- and, yes. And
08:57:52 10 -- and we're going to get there. And individuals
08:58:04 11 pursuant to that mathematical algorithm that have
08:58:12 12 genuine memory impairment are designated possible
08:58:16 13 genuine memory impairment profile; correct?

08:58:19 14 **A.** Yes, possible genuine memory impaired profile.

08:58:22 15 **Q.** And the test's sensitivity is the ability to
08:58:25 16 accurately discriminate between those individuals
08:58:29 17 with genuine impairment, versus those individuals
08:58:33 18 purposefully giving less than their best effort;
08:58:36 19 correct?

08:58:36 20 **A.** No.

08:58:37 21 **Q.** Okay. What is sensitivity?

08:58:39 22 **A.** Sensitivity is the measure's ability to detect
08:58:43 23 exaggeration when exaggeration is truly there.

08:58:53 24 **Q.** When you do that, detect exaggeration and when
08:58:56 25 exaggeration is truly there, you are able to

08:58:58 1 discriminate the exaggerators from those who have a
08:59:03 2 genuine impairment; correct?

08:59:10 3 **A.** Yes, that deals with specificity more than
08:59:13 4 sensitivity. The two go hand in hand, but they're
08:59:16 5 different.

08:59:16 6 **Q.** But if you're able to distinguish -- fairly
08:59:23 7 discriminate between those -- well, sensitivity --
08:59:29 8 sensitivity is to make sure that you are identifying
08:59:36 9 the figures; right?

08:59:42 10 **A.** Yes.

08:59:42 11 **Q.** And the WMT, the NV-MSVT, and the MSVT
08:59:52 12 individually have high sensitivity values; correct?

09:00:04 13 **A.** Not -- no, not necessarily. It depends on the
09:00:08 14 -- the manner in which somebody looks at the test.
09:00:11 15 If you only look at a part of the algorithm, they
09:00:15 16 have very high -- they have higher sensitivity. If
09:00:19 17 you look at the whole algorithm that protects
09:00:24 18 specificity, then the sensitivity drops.

09:00:26 19 **Q.** Okay. What's specificity?

09:00:29 20 **A.** Specificity is a measure's -- it's the amount
09:00:38 21 that the measure calls people -- correctly calls
09:00:48 22 non-impaired people -- or correctly calls
09:00:52 23 non-exaggerating people non-exaggerating. In other
09:00:55 24 words, it's -- it's the opposite of false positive
09:00:59 25 rate.

09:00:59 1 So a test with high specificity has
09:01:03 2 small false positive rates. That means it would not
09:01:06 3 call somebody exaggerating when they're not.

09:01:11 4 Q. It wouldn't call somebody exaggerating when
09:01:14 5 they're not is specificity?

09:01:17 6 A. Yes.

09:01:17 7 Q. And sensitivity?

09:01:21 8 A. Is identifying exaggeration when it exists.

09:01:23 9 Q. Identifying exaggeration when it exists.

09:01:26 10 But -- so there's research that you've cited -- and
09:01:32 11 the numbers vary from the studies, but there's
09:01:35 12 research on WMT, NV-MSVT, MSVT that individually --
09:01:43 13 individually administered -- some of those tests and
09:01:48 14 papers have found that they had sensitivity of, you
09:01:53 15 know, 90 percent, 80 percent. Are you familiar with
09:02:02 16 those studies?

09:02:02 17 A. Yes, and as you said there's a lot of
09:02:05 18 variability, because many of the studies don't look
09:02:07 19 at the entire algorithm. They only look at a
09:02:09 20 portion of it. Those tend to have the higher
09:02:12 21 sensitivity numbers.

09:02:12 22 Q. And when you are talking about the -- the
09:02:16 23 algorithm, are you including clinical judgment
09:02:19 24 afterwards in -- as part of the algorithm or no?

09:02:23 25 A. No.

09:02:23 1 Q. Okay. Do sensitivity values increase if two
09:02:32 2 tests are given?

09:02:33 3 A. Generally speaking, yes, to some small amount.

09:02:37 4 Q. Well, did you -- sensitivity was around
09:02:43 5 80 percent if two of those tests were given; is that
09:02:48 6 accurate?

09:02:51 7 A. Yes, with simulators that's true. Sensitivity
09:02:56 8 is higher with simulators than it is with known
09:03:00 9 groups.

09:03:00 10 Q. When you talk about simulators, you are talking
09:03:06 11 about a group that is instructed to try and
09:03:09 12 purposefully act like they're impaired to generate a
09:03:17 13 genuine memory impairment profile; correct?

09:03:21 14 A. That would be one example of a simulation
09:03:23 15 situation, yes.

09:03:24 16 Q. And the study we talked about yesterday, you
09:03:26 17 had a group of psychology graduate students that you
09:03:29 18 had instructed to try and obtain a genuine memory
09:03:36 19 impairment profile; correct?

09:03:37 20 A. Yeah, they were not instructed to create a
09:03:40 21 genuine memory impaired profile. They were
09:03:43 22 instructed to act -- to simulate having dementia.

09:03:51 23 Q. Which would -- which should generate a genuine
09:03:57 24 memory impaired profile; correct?

09:04:04 25 A. I'm not sure if "should" is correct.

09:04:06 1 Theoretically it very well could, yes.

09:04:09 2 Q. But the -- the genuine memory impairment
09:04:13 3 profile itself is meant to identify people with
09:04:20 4 cognitive problems like dementia so that they're not
09:04:24 5 captured as a false positive; is that right?

09:04:26 6 A. No, that's not right.

09:04:27 7 Q. Okay, explain?

09:04:28 8 A. Yeah, that's where you are mixing up the
09:04:32 9 specificity side of it, and treating it as if it's
09:04:35 10 sensitivity. The tests were never designed as a
09:04:38 11 measure to detect severe cognitive problems. They
09:04:42 12 were designed to detective exaggeration, but the
09:04:49 13 genuine memory impaired profile, as well as the rest
09:04:50 14 of the instructions related to interpreting it, is
09:04:54 15 meant to decrease false positive rates among people
09:04:59 16 who have genuine, serious cognitive problems.

09:05:02 17 Q. So in other words, if you have dementia these
09:05:13 18 tests, historically, were generating false
09:05:16 19 positives, and designating those people as
09:05:19 20 exaggerators when they weren't; correct?

09:05:20 21 A. Only if someone looked at the first criterion
09:05:24 22 rule.

09:05:24 23 Q. And then they added another criterion rule, the
09:05:27 24 B criterion; correct?

09:05:29 25 A. Yes, that was added, as well as the the latter

09:05:34 1 stages of the interpretation process.

09:05:36 2 Q. And with the genuine memory impaired profile,
09:05:41 3 rather than be identified as exaggerators, the
09:05:45 4 dementia pool was then identified, and would go
09:05:49 5 through the algorithm. And at least the rules were
09:05:53 6 designed to have those people fall into the genuine
09:05:58 7 memory impairment -- the possible genuine memory
09:06:02 8 impairment profile; correct?

09:06:03 9 A. Yes, but it's more than just simply A and B.
09:06:06 10 There's other rules, too, that affect it.

09:06:08 11 Q. We're going to go through the whole --

09:06:10 12 A. Okay.

09:06:10 13 Q. So -- -- the study we discussed yesterday with
09:06:19 14 the graduate students where they were told to feign
09:06:23 15 dementia, those were psychology students, graduate
09:06:26 16 students?

09:06:27 17 A. Yes.

09:06:27 18 Q. And in that study, you were researching whether
09:06:34 19 if you -- rather than conducting two tests, if you
09:06:39 20 conducted three tests, whether you could increase
09:06:42 21 sensitivity; correct?

09:06:49 22 A. Yes. Yes, correct.

09:06:54 23 Q. And with respect to the cohort that you had,
09:06:58 24 and when you combined all three tests you achieved
09:07:03 25 100 percent sensitivity; correct?

09:07:07 1 **A.** Yes. As I tried to explain yesterday, yes,
09:07:16 2 with a caveat. There's one person that did not
09:07:18 3 actually produce the type of pattern that you would
09:07:20 4 expect in severe compromise.

09:07:22 5 **Q.** But -- but no -- not one single person was able
09:07:29 6 to generate a genuine memory impairment profile -- a
09:07:35 7 possible genuine memory impairment profile across
09:07:38 8 all three tests; correct?

09:07:39 9 **A.** I'm sorry, could you ask that again?

09:07:40 10 **Q.** Yes. There wasn't a single simulator, not one
09:07:44 11 person who was able to generate a possible genuine
09:07:51 12 memory impairment profile across all three tests?

09:07:54 13 **A.** That is correct. One of them wasn't actually a
09:07:57 14 fail, so it didn't fit that category.

09:08:00 15 **Q.** And yet you testified that you believed
09:08:03 16 Mr. Brockman had taken five, not six, of the Green
09:08:08 17 stand-alone validity tests; do you remember that?

09:08:11 18 **A.** Spread out over time, yes.

09:08:13 19 **Q.** Is that still your understanding?

09:08:19 20 **A.** I believe so. I was trying to count them up on
09:08:22 21 the fly. That was my recollection. It may be off,
09:08:24 22 I don't recall -- several.

09:08:27 23 **Q.** And I had asked you whether -- for all of the
09:08:35 24 Green, stand-alone validity tests whether the
09:08:39 25 computer algorithm spit out for every single one a

09:08:46 1 possible genuine memory impairment profile. And you
09:08:52 2 answered that, no, for one of the tests the computer
09:08:56 3 did not spit out a possible genuine memory
09:09:03 4 impairment profile; is that correct?

09:09:04 5 **A.** Yes, because of decision rules that were
09:09:06 6 broken.

09:09:08 7 **Q.** Okay. So I think -- oh, and we'll go through
09:09:16 8 all of the tests, but just to go back to the --
09:09:20 9 cover one -- one sort of formality. After you left
09:09:24 10 the stand yesterday, did you talk to Dr. Dietz,
09:09:28 11 Dr. Darby, or anyone of the prosecution team about
09:09:31 12 the subject matter of your case?

09:09:32 13 **A.** No.

09:09:36 14 **Q.** All right. On May 19, 2021, -- what number are
09:10:05 15 we up to? Defense Exhibit 59. Okay. Are you able
09:10:45 16 to see this?

09:10:46 17 **A.** It's a little bit cut off on the right side, so
09:10:50 18 if you can shrink it just a tiny bit and slide it to
09:10:56 19 the left. Little more.

09:11:03 20 **Q.** It's on the screen behind you.

09:11:05 21 **A.** Yeah, but not on this. There you go. I think
09:11:08 22 that's good enough. Thank you.

09:11:10 23 **Q.** And so, do you recognize what this document is?

09:11:15 24 **A.** Yes, this is interpretive flow sheet that
09:11:20 25 guides the examiner through the mathematical rules,

09:11:25 1 as well as the interpretive process.

09:11:27 2 Q. Okay. You look down at the identifying test
09:11:36 3 date. This is the -- the sheet for the Word Memory
09:11:42 4 Test that you administered on May 19, 2021?

09:11:45 5 A. Yes, it is.

09:11:47 6 MR. LOONAM: Your Honor, we admit
09:11:48 7 Defendant's Exhibit 59.

09:11:51 8 THE COURT: Without objection, Defense
09:11:53 9 Exhibit 59 is admitted.

09:11:54 10 MR. LOONAM: Okay.

09:11:55 11 Q. Does this sheet reflect that the computer
09:12:04 12 algorithm designated Mr. Brockman's test as a
09:12:14 13 possible genuine memory impairment profile?

09:12:14 14 A. Yes, may I explain how this works so the Court
09:12:17 15 can understand the process?

09:12:19 16 Q. Well, I'll ask you -- I'll ask you questions
09:12:22 17 that go off of this. So -- so when you get -- when
09:12:26 18 you get to this stage -- so Mr. Brockman has taken
09:12:30 19 the test. It analyzes the different results through
09:12:36 20 the mathematical formula. It could come out several
09:12:45 21 ways, including poor or little effort profile, which
09:12:47 22 is right above it; correct?

09:12:47 23 A. Yes.

09:12:48 24 Q. But it designated his as possible genuine
09:12:52 25 memory impairment. It's at that stage that the test

09:12:58 1 then is subject to your own subjective, clinical
09:13:03 2 judgment; correct?

09:13:06 3 **A.** Well, I guess if you want to differentiate the
09:13:14 4 mathematical rules from the clinical interpretation
09:13:17 5 processes objective and subjective, so be it. Then
09:13:22 6 that's fine, because you have to then -- because
09:13:27 7 it's only a possible genuine memory impairment. And
09:13:30 8 then the arrow goes to the right where it says,
09:13:34 9 "Could be valid. Apply the Slick criteria," and
09:13:37 10 then it goes to the right again.

09:13:39 11 Lastly, you interpret relative to
09:13:42 12 appropriate comparison groups.

09:13:43 13 **Q.** Okay. Where does the math algorithm stop?

09:13:47 14 **A.** It stops at that possible genuine memory
09:13:53 15 impairment stage.

09:13:54 16 **Q.** The math algorithm stops there at possible
09:13:56 17 genuine memory impairment; correct?

09:13:59 18 **A.** Yes.

09:13:59 19 **Q.** So this isn't -- there's no algorithm here;
09:14:01 20 right? There's no algorithm -- this is applying
09:14:07 21 your subjective, clinical judgment in the context of
09:14:14 22 certain criteria to determine whether you believe
09:14:19 23 it's an actual memory impairment or not; correct?

09:14:25 24 **A.** Yes, but the interpreting relative to
09:14:27 25 appropriate comparison groups -- you look at numbers

09:14:30 1 and scores and the differences and how that pattern
09:14:32 2 plays out.

09:14:33 3 Q. And that's -- those are the graphs that you had
09:14:37 4 up on direct. We're going to go through those.

09:14:39 5 A. Sure.

09:14:39 6 Q. So there are different groups on a graph that
09:14:42 7 show -- pursuant to different subparts of the test,
09:14:47 8 how the examiner -- examinee performed, versus
09:14:53 9 certain groups that are on the chart; correct?

09:14:55 10 A. Exactly.

09:15:00 11 Q. And do you select the groups that are on that
09:15:03 12 chart, or is that part of the package -- like that
09:15:08 13 -- that -- like Dr. Green, like, automatically spits
09:15:14 14 out of a software?

09:15:15 15 A. These are selected as the most relevant
09:15:18 16 comparison groups, the groups that would be most
09:15:20 17 relevant to the question at hand.

09:15:22 18 Q. By whom is my question.

09:15:23 19 A. The ones I included here in this process --
09:15:30 20 some of them were automatically generated, but on
09:15:33 21 those I believe I lined them up and put them on
09:15:35 22 there, the groups I selected.

09:15:36 23 Q. So you selected comparison groups that are on
09:15:39 24 the -- the charts that -- that were up on direct;
09:15:42 25 correct?

09:15:43 1 **A.** Correct.

09:15:43 2 **Q.** Yeah. And -- and we will walk through those.
09:15:49 3 Because you gave examples of those in your
09:15:51 4 supplemental report; correct?

09:15:52 5 **A.** Correct.

09:15:53 6 **Q.** Yeah. All right. So that's why on direct you
09:15:57 7 were testifying, -- and you were careful in your
09:16:02 8 testimony to say, "It is my opinion that it was a
09:16:05 9 fail."

09:16:12 10 It's because of the subjective,
09:16:14 11 clinical judgment that's involved once you have a
09:16:16 12 possible genuine memory impairment profile; correct?

09:16:21 13 **A.** It was due to my judgment based upon these
09:16:24 14 comparison groups, yes.

09:16:25 15 **Q.** Yeah, and that's -- in your clinical judgment,
09:16:28 16 that comes into play specifically here because had
09:16:33 17 -- had -- well -- and on the test, if you -- well,
09:16:44 18 anyway. Once you get past the genuine memory
09:16:50 19 impairment stage -- asked and answered, I'm sorry.
09:16:56 20 Okay. So that's the -- that's the WMT for May 19,
09:17:09 21 2021.

09:17:09 22 I'm going to show you what is marked
09:17:11 23 as Defendant's Exhibit 60. Is that okay on your
09:17:40 24 screen?

09:17:41 25 **A.** Yes, thank you.

09:17:44 1 Q. Okay. Do you recognize Defense Exhibit 60?

09:17:48 2 A. Yes, it's a flow sheet for interpretive
09:17:51 3 analysis of -- of the Non-Verbal Medical Symptom
09:17:56 4 Validity Test.

09:17:56 5 Q. And is this the flow sheet for the Non-Verbal
09:18:01 6 MSVT that you administered to Mr. Brockman on --

09:18:07 7 A. May 19th, yes.

09:18:08 8 Q. May 19, 2021?

09:18:10 9 A. Yes, it is.

09:18:15 10 Q. And the flow sheet for this is -- is just a bit
09:18:18 11 different than the Word Memory Test; correct?

09:18:20 12 A. Yeah, there are variations in the math.

09:18:27 13 Q. Yeah, but if you follow the -- the process
09:18:29 14 through, you -- you go through here, which states,
09:18:35 15 "Data could be valid, but applies Slick, et al,
09:18:40 16 Criterion D."

09:18:40 17 So this -- basically that box sort of
09:18:45 18 condenses the other boxes that appeared in the word
09:18:52 19 memory flow sheet; correct?

09:18:53 20 A. Yeah, in essence that's true. Yeah, you look
09:18:57 21 -- apply the Slick analysis to identify whether
09:18:59 22 there are implausible characteristics and look at
09:19:03 23 the appropriate comparison groups. All of that
09:19:06 24 would be included this.

09:19:07 25 Q. But this reflects that it qualified for a

09:19:13 1 possible genuine memory impairment profile; correct?

09:19:18 2 **A.** Possible, yes.

09:19:19 3 **Q.** And that's when you exercise your subjective
09:19:23 4 clinical judgment. You do the comparisons on the
09:19:28 5 chart we discussed and then exercise your judgment;
09:19:31 6 correct?

09:19:32 7 **A.** Yes, in comparison to appropriate comparison
09:19:36 8 groups. Exactly.

09:19:37 9 **Q.** And we're going to walk through that once we
09:19:39 10 get through these -- the flow charts. That's
09:19:42 11 Government's Exhibit 60 [SIC].

09:19:44 12 **MR. LOONAM:** Your Honor, we move 60 in.

09:19:45 13 **THE COURT:** Without objection -- I
09:19:48 14 mean, Defendant's exhibit --

09:19:50 15 **MR. LOONAM:** Defendant's Exhibit 60.
09:19:52 16 Did I do that again? Defendant's Exhibit 60 we move
09:19:54 17 into evidence, Your Honor.

09:19:55 18 **THE COURT:** Defendant's Exhibit 60 is
09:19:57 19 admitted.

09:20:04 20 **MR. LOONAM:** I'll get it by the end of
09:20:06 21 this hearing, Your Honor.

09:20:07 22 **THE COURT:** Not a problem. Just wanted
09:20:08 23 to make sure I heard it correctly.

09:20:26 24 **MR. LOONAM:** Defendant's Exhibit 61.

09:20:44 25 **Q.** Are you able to see that sir?

09:20:45 1 **A.** Yes.

09:20:45 2 **Q.** Do you recognize Defendant's Exhibit 61?

09:20:48 3 **A.** Yes.

09:20:49 4 **Q.** Is this the flow sheet for the MSVT
09:20:56 5 administered by Dr. Guilmette on July 13, 2021?

09:21:01 6 **A.** Yes.

09:21:02 7 **Q.** Okay.

09:21:03 8 **MR. LOONAM:** Your Honor, we move
09:21:05 9 Defendant's Exhibit 61 into evidence.

09:21:08 10 **THE COURT:** Defendant's Exhibit 61 is
09:21:10 11 admitted.

09:21:12 12 **MR. LOONAM:**

09:21:12 13 **Q.** Again, does Defendant's Exhibit 61 reflect that
09:21:17 14 the algorithm designated Mr. Brockman's test as
09:21:22 15 qualifying for a possible genuine memory impairment
09:21:28 16 profile?

09:21:39 17 **A.** Yes, it does, possible genuine memory
09:21:42 18 impairment.

09:21:50 19 **MR. LOONAM:** Marking Defendant's
09:22:26 20 Exhibit 62.

09:22:26 21 **Q.** Do you recognize what I've marked as
09:22:31 22 Defendant's Exhibit 62?

09:22:33 23 **A.** Yes, I do.

09:22:34 24 **Q.** Okay. And is this the flow sheet for the MSVT
09:22:39 25 test administered by Dr. Guilmette on October 2,

09:22:46 1 2021?

09:22:46 2 **A.** Yes, it does.

09:22:46 3 **Q.** All right. And does this flow sheet reflect
09:22:51 4 that the computer algorithm identified

09:22:56 5 Mr. Brockman's test results as qualifying for a
09:22:59 6 possible genuine memory impairment profile?

09:23:01 7 **A.** Yes. However, with this test there are other
09:23:06 8 -- or with this particular example there are other
09:23:09 9 characteristics here that make that possible,
09:23:13 10 genuine memory impairment go away.

09:23:16 11 **Q.** Well, but here in the flow sheet --

09:23:17 12 **A.** That's reflected in the report.

09:23:19 13 **Q.** But -- but on the flow sheet it reflects that
09:23:23 14 it qualifies for possible genuine memory impairment
09:23:26 15 profile?

09:23:26 16 **A.** On the flow sheet, yes.

09:23:27 17 **Q.** And then you have to move on to your subjective
09:23:31 18 judgment to assess that possible genuine memory
09:23:35 19 impairment profile?

09:23:35 20 **A.** In this case, not subjective, no. There are
09:23:38 21 other mathematical findings on this particular test
09:23:43 22 that the report actually designates as indicative of
09:23:51 23 not a genuine memory impairment profile.

09:23:56 24 **Q.** Indicative. So you are maintaining that even
09:23:59 25 though the results that are indicated from the --

09:24:02 1 the computer printout state that it qualifies for
09:24:08 2 possible genuine memory impairment profile, it
09:24:10 3 doesn't really mean that?

09:24:12 4 **A.** Well, this is not the entire printout. This is
09:24:14 5 only one page. There's other places in the printout
09:24:17 6 that elucidate this finding.

09:24:22 7 **Q.** All right. So that's the MSVT of Defendant's
09:24:29 8 Exhibit 62. Defendant's Exhibit 63. Do you
09:24:47 9 recognize Defendant's Exhibit 63?

09:24:53 10 **A.** Yes, I do.

09:24:55 11 **Q.** And is this the NV-MSVT that you administered
09:25:05 12 to Mr. Brockman on October 20, 2021?

09:25:09 13 **A.** Yes, it is.

09:25:11 14 **Q.** And does this flow chart reflect that the
09:25:16 15 computer identified Mr. Brockman's test results as
09:25:19 16 qualifying as a possible genuine memory impairment
09:25:23 17 profile?

09:25:23 18 **A.** Yeah, it doesn't specifically say that. It
09:25:25 19 says, "Data could be valid, but apply Slick et al
09:25:29 20 criterion."

09:25:30 21 But for the sake of what we're
09:25:31 22 talking about, that would be reasonably interpreted
09:25:34 23 as possible genuine memory impairment profile.

09:25:35 24 **Q.** Yeah, that's what we're talking about before.
09:25:37 25 On this particular test, it sort of shrinks those

09:25:42 1 boxes down to one.

09:25:43 2 **A.** Yeah, it's a little different in that regard,
09:25:45 3 but the point --

09:25:45 4 **Q.** The substance is the same?

09:25:47 5 **A.** Yeah.

09:25:49 6 MR. LOONAM: Your Honor, we move 63
09:25:51 7 into evidence.

09:25:52 8 THE COURT: Without objection,
09:25:54 9 Defendant's Exhibit 63 is admitted.

09:25:58 10 MR. LOONAM:

09:25:58 11 **Q.** Defendant's Exhibit 64. Do you recognize what
09:26:25 12 I've marked as Defendant's Exhibit 64?

09:26:26 13 **A.** Yes.

09:26:27 14 **Q.** Is this the -- is this the MSVT test that you
09:26:40 15 administered to Mr. Brockman on October 26, 2021?

09:26:44 16 **A.** Yes, it is.

09:26:46 17 **Q.** And again, does this flow sheet reflect that
09:26:52 18 Mr. Brockman obtained a possible genuine memory
09:26:59 19 impairment profile on this test?

09:27:00 20 **A.** Yes.

09:27:02 21 **Q.** I think if we -- if we counted them up, I think
09:27:07 22 there are six administrations of the Green
09:27:12 23 stand-alone tests in total. And you agree that
09:27:21 24 Mr. Brockman obtained a possible genuine memory
09:27:27 25 impairment profile on at least five of them;

09:27:30 1 correct?

09:27:31 2 **A.** That is correct.

09:27:33 3 **Q.** And with respect to the other -- the flow sheet
09:27:38 4 at least reflects that Mr. Brockman obtained a
09:27:45 5 genuine memory impairment profile, but you believe
09:27:46 6 that profile is not valid, pursuant to other
09:27:51 7 information in the report; correct?

09:27:52 8 **A.** Exactly right.

09:28:01 9 **Q.** And in the study of simulators that we
09:28:07 10 described before that you conducted, you -- you
09:28:12 11 found that none of the simulators could generate a
09:28:21 12 genuine memory impairment profile across three
09:28:28 13 tests; correct?

09:28:31 14 **A.** None of them could --

09:28:33 15 **Q.** Generate a genuine memory impairment --

09:28:37 16 **A.** None of them did. One was equivocal. But,
09:28:43 17 yeah, that's true all three tests taken at one time.

09:28:45 18 **Q.** Different -- this is spread out?

09:28:47 19 **A.** Sure.

09:28:48 20 **Q.** So -- but you -- you get to choose the tests
09:28:51 21 that you administer; correct?

09:28:55 22 **A.** Yes.

09:28:55 23 **Q.** So if you wanted to administer the three Green
09:28:59 24 tests in one sitting, you could have done that;
09:29:02 25 correct?

09:29:04 1 **A.** Yes, I could have.

09:29:07 2 **Q.** And --

09:29:10 3 **A.** Given time limitations, I could have, yeah.

09:29:12 4 **Q.** Yeah, but you -- given the time -- given the
09:29:17 5 time you spent with Mr. Brockman in this case, you
09:29:19 6 certainly could have administered the three Green
09:29:24 7 tests if you wanted to; correct?

09:29:26 8 **A.** Yes.

09:29:35 9 **Q.** You administered the Victoria Symptom Validity
09:29:46 10 Test with Mr. Brockman; correct?

09:29:52 11 **A.** And that -- that test has a -- there's -- well,
09:30:12 12 let me -- there's -- there's a high -- higher risk
09:30:17 13 for dementia patients obtaining a false positive on
09:30:22 14 that test; correct?

09:30:24 15 **A.** Yes, if you use the original cutoffs on it;
09:30:30 16 correct.

09:30:45 17 **MR. LOONAM:** What am I up to?

09:30:54 18 **THE WITNESS:** If I may finish my
09:30:56 19 answer? But not if you adjust the cutoffs for
09:31:02 20 severe, cognitive impaired populations.

09:31:10 21 **MR. LOONAM:**

09:31:11 22 **Q.** And that makes -- that makes the test easier to
09:31:16 23 pass, not harder; correct?

09:31:18 24 **A.** Yes.

09:31:19 25 **Q.** Okay. And on your direct testimony, you

09:31:35 1 testified that Mr. Brockman failed the Victoria
09:31:41 2 Symptom Validity Test; correct?

09:31:43 3 **A.** Yes.

09:31:44 4 **Q.** And on the Victoria Symptom Validity Test, you
09:31:51 5 can obtain a valid or a pass score; correct?

09:31:54 6 **A.** Yes.

09:31:55 7 **Q.** You can obtain an invalid or a fail score;
09:32:00 8 correct?

09:32:03 9 **A.** Possibly. It depends on where you are going
09:32:05 10 with the question.

09:32:06 11 **Q.** And then you could obtain a questionable --
09:32:08 12 well, I mean I want to understand what the different
09:32:11 13 sort of outputs are; right. So are the outputs you
09:32:15 14 can obtain a -- a pass, which is also -- some types
09:32:22 15 of pass is called a valid score; is that correct?

09:32:25 16 **A.** Yes.

09:32:26 17 **Q.** Okay. And then you could obtain a fail, and
09:32:30 18 that's sometimes an invalid score; correct?

09:32:37 19 **A.** Not -- yes and no. It depends on what context
09:32:41 20 you are talking about. I can probably clear this up
09:32:43 21 if I may re-phrase what you are asking.

09:32:47 22 **Q.** Let me ask. And then you could also obtain a
09:32:51 23 chance score or a questionable score; correct?

09:32:53 24 **A.** Okay. Based upon the binomial theorem those
09:32:59 25 are true, yes.

09:32:59 1 Q. Yes.

09:33:00 2 A. And those are presented in the original manual
09:33:02 3 from the mid-1990's.

09:33:08 4 Q. And there's -- similar to the Green tests, do
09:33:11 5 you submit the Victoria Symptom Validity Test, and
09:33:13 6 it -- it has a mathematical scoring sheet that spits
09:33:19 7 out and tells you what the results are?

09:33:22 8 A. Yeah, based solely on the binomial theorem.

09:33:29 9 Q. So I'm going to show you Government Exhibit 65
09:33:33 10 [SIC] -- Defendant's Exhibit 65. Do you recognize
09:33:39 11 this document?

09:33:40 12 A. Yes, I do.

09:33:41 13 Q. What do you recognize it to be?

09:33:43 14 A. It is the Victoria Symptom Validity Test
09:33:46 15 printout report for my examination of Mr. Brockman
09:33:51 16 on May 19, 2021.

09:33:54 17 Q. Okay. Turning to Page 2 of the document. At
09:34:05 18 the top it says, "Suggested interpretation."

09:34:10 19 And for all three items -- easy
09:34:14 20 items, difficult items, and total items correct,
09:34:19 21 those fell as scored by the program as chance or
09:34:26 22 questionable results, not as fails or invalid
09:34:30 23 results; correct?

09:34:31 24 A. That is correct, based upon that algorithm of
09:34:35 25 the binomial theorem.

09:35:17 1 MR. LOONAM: I'm just marking this for
09:35:19 2 identification 66. Defendant's Exhibit 66.

09:35:41 3 Oh, Your Honor, Defense moves
09:35:44 4 Defendant's Exhibit 65 into evidence.

09:35:45 5 THE COURT: Okay. Any objection?

09:35:47 6 MR. COREY SMITH: No objection, Your
09:35:49 7 Honor.

09:35:49 8 THE COURT: Without objection,
09:35:50 9 Defendant's Exhibit 65 is admitted.

09:35:56 10 MR. LOONAM:

09:35:57 11 Q. Showing you what's marked for identification as
09:36:01 12 Defense Exhibit 66. Are you familiar with this
09:36:06 13 study, which is the *Victoria Symptom Validity Test*
09:36:10 14 *Performance in Heterogeneous Clinical Sample*?

09:36:13 15 A. Yes, it is -- yes, I am.

09:36:23 16 Q. In this study it says that, "Chance responding
09:36:27 17 on the hard VSVT items" -- and defines that as 8 out
09:36:33 18 of 24, through 15 out of 24 -- "with slightly
09:36:37 19 greater with ten percent in the clinically referred
09:36:42 20 group, and did not appear to differ as a function of
09:36:45 21 diagnosis."

09:36:46 22 Mr. Brockman, on the hard items on
09:36:50 23 the VSVT test scored an 8; correct?

09:36:54 24 A. That is correct.

09:37:07 25 Q. This paper also states that their data

09:37:09 1 suggests, "An increase likelihood of poor SVT
09:37:13 2 performance in dementia patients compared to other
09:37:16 3 clinical diagnoses" -- and it gives a p-value of
09:37:21 4 .06 -- "using either chance responding, or
09:37:24 5 empirically derived cutoffs for classification. We
09:37:27 6 believe that this reflects disease characteristics,
09:37:30 7 and consequently should be considered false positive
09:37:33 8 errors."

09:37:34 9 Do you agree with that analysis?

09:37:37 10 **A.** Yes.

09:37:47 11 **Q.** And the reason you decided that Mr. Brockman's
09:37:54 12 tests called as a fail is you moved the goalpost on
09:38:01 13 the mathematical equation; correct?

09:38:04 14 **A.** No.

09:38:05 15 **Q.** Well, did you move -- did you alter the
09:38:08 16 mathematical equation used to score the test?

09:38:16 17 **A.** No.

09:38:16 18 **Q.** Did you change the p-value?

09:38:20 19 **A.** There were two aspects to that test that made
09:38:22 20 it a fail in terms of its relevance for dementia
09:38:28 21 patients. One was the hard items score of 8, which
09:38:33 22 was below 11. That was the recommended cutoff from
09:38:37 23 that paper for use with potential dementia-type
09:38:40 24 situations. That was one thing, so it's a fail
09:38:45 25 there.

09:38:45 1 Then it's also the low enough in
09:38:47 2 the probability scale, based upon the binomial, that
09:38:51 3 it would still be considered indicative of intent.

09:38:55 4 Q. But doesn't -- doesn't the manual state -- so
09:38:59 5 first of all, the manual sets -- the manual for the
09:39:12 6 hard items --

09:39:13 7 A. The manual only looked at the binomial theorem
09:39:15 8 as it was understood in the mid-1990's. In the
09:39:19 9 subsequent 20-some years, the research has evolved,
09:39:23 10 and we've gotten a lot more sophisticated
09:39:26 11 understanding the binomial theorem, as well as how
09:39:30 12 clinical groups perform outside the binomial
09:39:33 13 theorem.

09:39:33 14 Q. And what -- what -- what changes here -- well,
09:39:37 15 what is -- what is "P" representing?

09:39:41 16 A. "P" represents the probability of a score
09:39:44 17 falling out into a tail of a normal distribution.
09:39:49 18 In this instance, a tail on the lower side -- well,
09:39:55 19 it could be either actually, but usually what we're
09:39:59 20 talking about is the lower end. It's the -- it's
09:40:01 21 the demarcation between -- it tells you how far out
09:40:06 22 in the tail of the curve that score fell.

09:40:08 23 Q. And the p-value used for the binomial scoring
09:40:17 24 was what?

09:40:18 25 A. On that printout?

09:40:19 1 Q. Yeah.

09:40:19 2 A. From the mid-1990's, p-value .05.

09:40:23 3 Q. And what p-value did you use to get the cutoff
09:40:28 4 to 11 -- do you know?

09:40:32 5 A. That's totally different issues. You are
09:40:35 6 combining two things that are not combinable.

09:40:37 7 Q. So the -- the p-value didn't play a role in --
09:40:42 8 in altering what the cutoff was?

09:40:44 9 A. Not -- not on the 11, no. That's totally
09:40:50 10 unrelated.

09:40:50 11 Q. Okay. And according to the manual of this
09:41:05 12 test, "The total items correct score provides the
09:41:09 13 most objective and quantifiable evidence regarding
09:41:12 14 whether respondents are exhibiting biased
09:41:16 15 responding"; is that correct?

09:41:18 16 A. From what are you reading? I don't know.

09:41:20 17 Q. Are you familiar with the *Victoria Test Manual*?

09:41:24 18 A. Yes.

09:41:25 19 Q. And are you familiar with the manual's
09:41:27 20 instruction that, "The total items score provides
09:41:33 21 the most objective and quantifiable evidence
09:41:37 22 regarding whether respondents are exhibiting biased
09:41:40 23 responding"?

09:41:43 24 MR. COREY SMITH: Just as a matter of
09:41:43 25 procedure, Your Honor? If the witness could just

09:41:44 1 have a copy so we can see what he's being asked
09:41:47 2 about?

09:41:47 3 MR. LOONAM: I would love to have a
09:41:48 4 copy of the manual, but these are all proprietary
09:41:52 5 and impossible to obtain.

09:41:54 6 MR. COREY SMITH: Aren't you reading
09:41:55 7 from this, 65? Can he have a copy if he's asked
09:42:01 8 questions about it?

09:42:02 9 MR. LOONAM: This is a scoring sheet.

09:42:03 10 MR. COREY SMITH: What are you are
09:42:04 11 reading from? It's a manual. I think the witness
09:42:06 12 should at least be able to see what he's being asked
09:42:09 13 about.

09:42:09 14 MR. LOONAM:

09:42:10 15 Q. Are you familiar with whether the manual
09:42:12 16 instructs people to consider the total score as the
09:42:18 17 most objective measure?

09:42:20 18 A. The manual published in the mid-1990's?

09:42:23 19 Q. The manual for the test, yeah.

09:42:25 20 A. Yeah, it does discuss that issue.

09:42:31 21 Q. And what the manual -- are you familiar with
09:42:34 22 the concept of what I just -- what I read to you?
09:42:39 23 And are you familiar -- like, are these manuals
09:42:43 24 difficult for people who aren't forensic examiners
09:42:45 25 to obtain?

09:42:46 1 THE COURT: Okay. That was a compound
09:42:47 2 question.

09:42:48 3 MR. LOONAM: Yeah, it was.

09:42:49 4 THE COURT: "Are you familiar," and
09:42:49 5 then "Does it state?"

09:42:50 6 So can you break it down so I can
09:42:52 7 understand it?

09:42:58 8 MR. LOONAM: Withdrawn.

09:43:05 9 Q. Just to be clear, you understand that the
09:43:07 10 manual for the test from the 1990's instructs that,
09:43:11 11 "The total items correct score provides the most
09:43:13 12 objective and quantifiable evidence regarding
09:43:16 13 whether respondents are exhibiting biased
09:43:21 14 reporting"?

09:43:21 15 A. Yeah, that's what it said, and that's what was
09:43:23 16 believed in the mid-1990's regarding the Victoria.

09:43:27 17 Q. It's your position now that the total score
09:43:33 18 does not provide the most objective and quantifiable
09:43:41 19 evidence regarding whether respondents are
09:43:43 20 exhibiting biased reporting?

09:43:44 21 A. No, I would not agree with that today. I don't
09:43:47 22 believe that's what the current, recent literature
09:43:51 23 supports, including the paper you showed me a minute
09:43:53 24 ago.

09:44:29 25 MR. LOONAM: One moment, Your Honor?

09:44:30 1 THE COURT: Sure. Take your time.

09:45:28 2 MR. LOONAM:

09:45:29 3 Q. *Dusky* establishes one standard for competence;
09:45:33 4 correct?

09:45:35 5 A. Yes, that is my understanding.

09:45:37 6 Q. But two defendants with the exact same
09:45:43 7 neurocognitive deficits could vary in whether
09:45:49 8 they're competent, based on the complexity of the
09:45:51 9 case; correct?

09:45:54 10 A. Yes, and other factors related to that, sure.

09:45:57 11 Q. And that's because more is required from a
09:46:01 12 defendant in a long, multiple-count -- for example,
09:46:06 13 bank fraud trial than for a single charge of illegal
09:46:10 14 reentry case; correct?

09:46:13 15 A. Yes.

09:46:14 16 Q. And you discussed other factors on your direct
09:46:22 17 testimony and in your report. I'm not sure about
09:46:25 18 it, but it seemed to me that you may be stating that
09:46:30 19 the quality of the defendant's counsel plays a role
09:46:42 20 whether the Defendant is competent to proceed. I
09:46:44 21 just want to clarify that point.

09:46:48 22 Does your perception of the
09:46:51 23 competence of counsel play any role in that
09:46:54 24 determination?

09:46:55 25 A. It provides context, and to the extent that the

09:47:02 1 Defendant is willing to rely on counsel, and counsel
09:47:05 2 is able to reproduce details from the record and put
09:47:11 3 that together, that is helpful in accommodating
09:47:15 4 difficulties a defendant may have.

09:47:17 5 Q. No, but so -- so is the answer -- I'm not sure
09:47:23 6 -- I want to make sure I'm very clear on what you
09:47:25 7 mean by it provides context. In -- in offering your
09:47:30 8 opinion on whether the Defendant is competent to
09:47:37 9 proceed to trial, do you assess the -- the quality
09:47:45 10 of his defense lawyers?

09:47:50 11 A. Well, I don't specifically assess the quality
09:47:52 12 of defense lawyers. I take -- I take that into some
09:47:56 13 degree of consideration, because there is some
09:47:59 14 indication that a -- for example, a defendant could
09:48:03 15 potentially be competent with assistance of counsel,
09:48:07 16 but not necessarily competent to do certain things
09:48:11 17 when representing himself. So there is a little bit
09:48:14 18 of an adjustment there that would -- would
09:48:18 19 correspond with the capability of counsel to assist
09:48:23 20 the Defendant, yes.

09:48:24 21 Q. So your view of the -- of applying the
09:48:28 22 competence standard is that the -- the analysis
09:48:33 23 would be different for a pro se defendant, versus a
09:48:36 24 represented defendant?

09:48:42 25 A. To some degree. There is a little bit of

09:48:43 1 adjustment to that. It provides a different
09:48:45 2 context.

09:48:46 3 Q. And so how -- in conducting your analysis to
09:48:48 4 make these adjustments, how do you go about
09:48:51 5 evaluating the quality of counsel to enter into your
09:48:56 6 opinion of whether the Defendant is competent to
09:48:59 7 proceed to trial?

09:49:02 8 A. Well, that's where I said I don't evaluate the
09:49:06 9 quality of counsel. I don't provide questionnaires
09:49:09 10 and try to identify how good counsel they are. I
09:49:13 11 don't evaluate them. I consider the context of
09:49:15 12 whether or not there is a tremendous amount of
09:49:19 13 assistance available for a defendant or not.

09:49:22 14 Q. And so -- tremendous amount. So -- so -- so
09:49:27 15 the ability of someone to have more lawyers factors
09:49:36 16 into your determination of whether or not they're
09:49:39 17 competent to proceed to trial?

09:49:41 18 A. No.

09:49:41 19 Q. Okay. Well, I'm just wondering -- when you
09:49:43 20 said the -- what -- I want to make sure I get your
09:49:46 21 testimony correct. The tremendous amount of
09:49:50 22 assistance -- what was the tremendous amount of
09:49:52 23 assistance you were referring to?

09:49:53 24 A. The capability of counsel to identify records,
09:50:01 25 reconstruct the alleged criminal offenses, and

09:50:04 1 provide that assistance for a defendant can help
09:50:07 2 overcome some cognitive deficiency of a defendant.
09:50:14 3 That's more easily done when there is a strong,
09:50:19 4 supportive defense team for somebody, than if there
09:50:22 5 is somebody obviously acting pro se where they're
09:50:24 6 trying to pull it together themselves.

09:50:26 7 **Q.** And my question is how -- how do you assess the
09:50:30 8 capability of counsel and whether there's a strong
09:50:36 9 supportive defense team? Like how do you -- how do
09:50:38 10 you determine that?

09:50:40 11 **A.** I don't assess it. It is either there or it
09:50:43 12 isn't.

09:50:44 13 **Q.** But then, that's a standard for something else
09:50:46 14 under the law. You know it when you see it, but I
09:50:51 15 don't understand. It's either there or it's not.
09:50:53 16 So any lawyer -- is that what you are saying, any
09:50:55 17 lawyer?

09:50:58 18 **A.** Any lawyer is better than no lawyer, yes.

09:51:01 19 **Q.** Okay. So then -- and any lawyer is better than
09:51:04 20 no lawyer, but then there's, like, a sliding scale
09:51:08 21 in your mind with respect to a bigger team or a more
09:51:11 22 capable team, and it goes from -- I don't know what
09:51:15 23 one end is versus a pro se? It sort of moves on a
09:51:18 24 sliding scale -- I don't know.

09:51:20 25 You tell me. You tell me how you do

09:51:21 1 this. I'm trying to understand what's factoring
09:51:24 2 into your decision?

09:51:24 3 **A.** Yeah, I said I do not rate quality of counsel
09:51:27 4 or in any regard like that. I don't do that.

09:51:31 5 **Q.** But how do you determine whether it's a strong
09:51:35 6 team that could offer tremendous support?

09:51:38 7 **MR. COREY SMITH:** I --

09:51:38 8 **THE COURT:** Okay. Objection's
09:51:39 9 sustained. Answer this question now counted five
09:51:42 10 times.

09:51:42 11 **MR. LOONAM:** Okay.

09:51:43 12 **THE COURT:** So the answer is he doesn't
09:51:45 13 evaluate the quality of counsel. I mean, he said it
09:51:49 14 five times. We just keep going around and around.
09:51:53 15 So respectfully, objection's sustained.

09:51:56 16 **MR. LOONAM:** All right.

09:51:56 17 **Q.** How many counts are involved in this case?

09:51:59 18 **A.** Numerous.

09:52:00 19 **Q.** Do you know how many?

09:52:01 20 **A.** Not off the top of my head, no.

09:52:04 21 **Q.** More than a dozen?

09:52:07 22 **A.** I said I don't know.

09:52:08 23 **Q.** Okay. And -- and what are -- what are the
09:52:12 24 charges alleged in this case?

09:52:15 25 **A.** There's tax evasion. There is -- oh, let's

09:52:23 1 see. I know there's tax evasion. There's several
09:52:31 2 others. I can't recall off the top of my head at
09:52:33 3 this moment.

09:52:39 4 Q. Are you familiar with the wire fraud counts in
09:52:41 5 this case?

09:52:44 6 A. I recall that there are wire fraud counts
09:52:47 7 involved, but I don't know the details enough to
09:52:51 8 tell you about them.

09:52:52 9 Q. Well, isn't it important for you to understand
09:52:54 10 the details of the indictment to assess whether or
09:52:58 11 not the Defendant understands the indictment?

09:53:07 12 A. Well, in a general way, yes. But in specific
09:53:11 13 details, not necessarily, no.

09:53:15 14 MR. LOONAM: I have no further
09:53:16 15 questions, Your Honor.

09:53:16 16 THE COURT: Okay. Redirect?

09:53:20 17 MR. COREY SMITH: No questions, Your
09:53:21 18 Honor.

09:53:21 19 THE COURT: Okay. May this witness be
09:53:22 20 excused?

09:53:23 21 MR. COREY SMITH: From the Government,
09:53:24 22 yes.

09:53:24 23 THE COURT: Okay. Great. Thank you,
09:53:26 24 Dr. Denney.

09:53:27 25 THE WITNESS: Thank you. Appreciate

09:53:29 1 it.

09:53:29 2 THE COURT: Thank you. Counsel, we're
09:53:30 3 just going to take a seven-minute break. We're
09:53:33 4 going to start up at ten o'clock. I need to take
09:53:35 5 care of something, and we'll get started right away.
09:53:37 6 Have your next witness ready to go?

09:53:39 7 MR. LANGSTON: Yeah.

09:53:39 8 THE COURT: Okay. Great. Get started
09:53:40 9 at ten o'clock.

10:02:49 10 (Whereupon, a recess was held.)

10:06:50 11 MR. LOONAM: Your Honor, housekeeping.
10:06:52 12 I think I failed to admit 62 and 64, which were flow
10:06:57 13 sheets into evidence.

10:06:59 14 THE COURT: Without objection?

10:07:00 15 MR. COREY SMITH: No objection, Your
10:07:01 16 Honor.

10:07:01 17 THE COURT: Defendant's Exhibit 62 and
10:07:03 18 64 are admitted.

10:07:04 19 MR. LOONAM: Thank you, Your Honor.

10:07:11 20 MR. LANGSTON: Government calls Craig
10:07:14 21 Moss.

10:07:14 22 THE COURT: Mr. Moss, good morning.

10:07:21 23
24 ///

25 ///

CRAIG MOSS,

(For the Government)

called as a Witness, having been duly
and regularly sworn, testified as follows:

THE WITNESS: I do.

THE COURT: Please take the stand, sir.

DIRECT EXAMINATION

BY MR. LANGSTON:

Q. Good morning, sir. Could you tell the Court
briefly how you know the Defendant, Robert Brockman?

THE COURT: Can you just have him --

MR. LANGSTON: Sorry.

Q. Could you state your name, spelling the last
for the record?

A. Sure, Michael Craig Moss, M-O-S-S.

Q. How do you know Mr. Brockman?

A. I've worked with Brockman for 29 years.

Q. Were you an employee at Reynolds and Reynolds?

A. Yes, sir.

Q. Can you give a very brief description of your
career?

A. Um, I was hired on originally as a part-time
recruiting assistant, and then I moved up through
the -- as I graduated and got my master's degree, I
moved into what was the international department,

10:08:22 1 and then moved into various pieces of the accounting
10:08:26 2 world, including the treasurer in 2009, and then
10:08:29 3 being promoted to CFO in 2013.

10:08:32 4 Q. But the latter part of your career when you
10:08:33 5 were treasurer and CFO, who did you report to?

10:08:36 6 A. As treasurer, I reported to Robert Burnett.
10:08:43 7 Once I became CFO, I reported directly to Bob.

10:08:46 8 Q. What year did you become CFO?

10:08:48 9 A. 2013.

10:08:49 10 Q. I'm going to direct your attention to
10:08:52 11 September 5, 2018. Did anything unusual happen to
10:08:59 12 you that day?

10:09:00 13 A. Yes, that was the day I was served a subpoena.

10:09:02 14 Q. Okay. Was that a subpoena in connection to
10:09:04 15 this case?

10:09:04 16 A. Yes, sir.

10:09:04 17 Q. Did you learn whether anyone else at Reynolds
10:09:08 18 and Reynolds received a subpoena that day?

10:09:09 19 A. Yes, I was -- before I received my subpoena, I
10:09:14 20 received a call from Charlie Zeto (phonetic), which
10:09:18 21 was a corporate pilot, and he received -- or someone
10:09:20 22 had come to his house looking for him to serve the
10:09:24 23 subpoena. And I didn't know what that was about,
10:09:26 24 but I was on my way to the office and just got
10:09:30 25 Cherry (phonetic) -- or in-house counsel.

10:09:31 1 Q. Okay. Without -- without having -- without
10:09:34 2 discussing your discussions with Mr. Cherry
10:09:36 3 (phonetic), did you make him aware of the fact that
10:09:38 4 you received a subpoena?

10:09:40 5 A. He -- he called me to tell me federal agents
10:09:43 6 were there to serve me a subpoena.

10:09:45 7 Q. All right. I'll direct your attention to one
10:09:47 8 month after you received the subpoena, and I'm going
10:09:49 9 to show you Government Exhibit 67, which is marked
10:09:53 10 for identification. Are you able to see -- are you
10:10:23 11 able to see that Mr. Moss?

10:10:25 12 A. It's a little blurry.

10:10:26 13 Q. How is that? Is that better?

10:10:29 14 A. Yes.

10:10:29 15 Q. Okay. And if you prefer, there's a binder
10:10:31 16 sitting next to you if you'd rather use the paper --
10:10:35 17 whatever is easier for you?

10:10:36 18 A. No, this should be fine.

10:10:37 19 Q. Okay. And then, is this an October 14, 2018,
10:10:42 20 e-mail between you and Mr. Brockman?

10:10:46 21 A. Yes.

10:10:46 22 Q. Okay. Could you briefly describe the substance
10:10:51 23 of the e-mail?

10:10:53 24 A. The contents -- this would have been about a
10:10:57 25 week after Bob had been indicted -- I'm sorry,

10:11:02 1 that's two years.

10:11:02 2 Q. 2018?

10:11:03 3 A. 2018. This was a month and a half after I
10:11:06 4 received the subpoena. And Bob was calling into
10:11:12 5 question whether or not Charlie was capable of
10:11:14 6 making -- having an understanding of what the
10:11:17 7 flights should be designated, whether they were
10:11:19 8 personal, or corporate, or charter flights. And
10:11:23 9 that was -- couldn't be further from the truth.

10:11:27 10 Charlie had been in the airline
10:11:28 11 industry for years and years, and a head pilot for a
10:11:31 12 number of years and knew exactly what he was doing.

10:11:33 13 Q. So Charlie is Charlie Zeto, who you described
10:11:36 14 as the pilot of the Reynolds and Reynolds's jet?

10:11:38 15 A. Correct. He was the head pilot.

10:11:41 16 Q. What you are speaking about in terms of the
10:11:43 17 business or personal purposes, Mr. Zeto had gotten a
10:11:48 18 request to designate the business or personal reason
10:11:50 19 for each flight?

10:11:51 20 A. Standard process, yes.

10:11:52 21 Q. Mr. Brockman is requesting you review that list
10:11:55 22 prior to being produced?

10:11:57 23 A. That's what he's asking for.

10:11:58 24 Q. Okay. Was this a usual request for
10:12:01 25 Mr. Brockman to be making of you?

10:12:03 1 **A.** Yes, this was unusual.

10:12:08 2 **Q.** Why do you say it was unusual?

10:12:09 3 **A.** It's unusual that he would ask -- from a timing
10:12:13 4 standpoint. It was not unusual, because we were all
10:12:16 5 aware of the tax implications of privately
10:12:19 6 designated flights from a tax standpoint. So we'd
10:12:22 7 always been aware of that and concerned about that.

10:12:25 8 **Q.** All right. I'm going to show you Exhibit 63 --

10:12:34 9 **MR. LANGSTON:** Sorry, Your Honor. Move
10:12:36 10 62 evidence.

10:12:38 11 **THE COURT:** Any objection?

10:12:39 12 **MS. KENEALLY:** No objection.

10:12:40 13 **THE COURT:** Without objection,
10:12:42 14 Government Exhibit 62 is admitted.

10:12:43 15 **THE COURT:** Can you make that bigger?

10:12:47 16 **MR. LANGSTON:** I'm sorry, 67. The
10:12:52 17 previous Exhibit 67 is what we're moving into
10:12:54 18 evidence.

10:12:57 19 **MS. KENEALLY:** Still no objection.

10:12:58 20 **THE COURT:** Without objection, it's
10:13:01 21 admitted.

10:13:01 22 **MR. LANGSTON:**

10:13:01 23 **Q.** Are you able to see that, Mr. Moss?

10:13:03 24 **A.** Yes.

10:13:04 25 **Q.** Could you tell us what's happening in this

10:13:06 1 e-mail in December of 2018?

10:13:09 2 **A.** It's a standard e-mail from Bob asking to make
10:13:13 3 a charitable contributions to the Baylor College of
10:13:17 4 Medicine.

10:13:17 5 **Q.** Do you see the, "Attention: Seth P. Lerner"?

10:13:21 6 **A.** Yes.

10:13:22 7 **Q.** Are you aware Dr. Lerner is the Defendant's
10:13:25 8 urologist?

10:13:25 9 **A.** I am not, no.

10:13:27 10 **Q.** Okay.

10:13:28 11 MR. LANGSTON: I'll offer 63, Your
10:13:31 12 Honor.

10:13:31 13 THE COURT: Okay. Any objection?

10:13:32 14 MS. KENEALLY: No, objection.

10:13:33 15 THE COURT: Without objections,
10:13:34 16 Defendant -- I mean Government Exhibit's 63 is
10:13:39 17 admitted.

10:13:40 18 MR. LANGSTON:

10:13:40 19 **Q.** I'm going to now show you Government Exhibit
10:13:42 20 71. Do you see the date of this e-mail?

10:13:52 21 **A.** Yes.

10:13:53 22 **Q.** What's the date?

10:13:55 23 **A.** October 21, 2019.

10:13:56 24 **Q.** Okay. So this is a year later?

10:13:59 25 **A.** Mm-hmm.

10:13:59 1 Q. Sorry. What concern is Mr. Brockman expressing
10:14:03 2 to you in October of 2019?

10:14:05 3 A. He wanted to make sure that we had our
10:14:08 4 paperwork and could substantiate any -- the excess
10:14:13 5 cash we were building in order to be able to defend
10:14:17 6 any questions regarding accumulated earnings.

10:14:20 7 Q. Okay. And so, we've been learning a lot about
10:14:27 8 neurology. Could you give us a very brief education
10:14:29 9 on accumulated earnings tax?

10:14:29 10 A. If you can adjust accumulated earnings, which
10:14:33 11 you would be justifying for you, like, to make
10:14:36 12 acquisitions, you are building cash for -- to build
10:14:39 13 a building, you are building cash for certain
10:14:42 14 things, then you are able to justify a reason to
10:14:45 15 build that cash. Otherwise, the Government would
10:14:48 16 want you to create a dividend for the share holders
10:14:55 17 spare.

10:14:55 18 Q. If you don't create the dividend what happens?

10:14:58 19 A. You are taxed.

10:14:59 20 Q. Mr. Brockman is expressing concern about this
10:15:04 21 accumulated earnings tax?

10:15:06 22 A. Correct.

10:15:06 23 Q. Is he also making a prediction to you about
10:15:09 24 what he sees as the future of the auto industry?

10:15:12 25 A. Let me look back. That is correct.

10:15:18 1 Q. What was his prediction in October of 2019?

10:15:21 2 A. That the vehicle sales were slowing as part of
10:15:24 3 a typical, historical sale cycle.

10:15:26 4 Q. What was he asking you to do based on his
10:15:30 5 concern about this accumulated earnings tax?

10:15:34 6 A. He was asking me to draft a document to support
10:15:37 7 that.

10:15:39 8 Q. In October of 2019, did you go on a hunting
10:15:43 9 trip to Argentina?

10:15:45 10 A. I believe so.

10:15:46 11 Q. Okay. And where exactly in Argentina is this
10:15:50 12 hunting trip?

10:15:51 13 A. Córdoba.

10:15:52 14 Q. And what were you hunting?

10:15:55 15 A. Dove.

10:15:56 16 Q. Was Mr. Brockman with you on this dove-hunting
10:15:59 17 trip?

10:16:00 18 A. Yes.

10:16:01 19 Q. Was he also hunting?

10:16:02 20 A. Yes.

10:16:03 21 Q. Did you observe him shooting at all on this
10:16:06 22 trip?

10:16:08 23 A. No, I don't believe I hunted with him.

10:16:10 24 Q. Do you know what he was -- what type of gun he
10:16:13 25 was using?

10:16:14 1 **A.** Um, he used a -- either a .410 or 28-gauge.

10:16:18 2 **Q.** Those are shotguns?

10:16:19 3 **A.** Shotguns, excuse me.

10:16:21 4 **Q.** I understand we are in Texas, so that may be
10:16:24 5 more obvious to everyone else.

10:16:26 6 **A.** Yes, sir.

10:16:26 7 **Q.** Did you have any concerns on that trip about
10:16:28 8 his ability to safely handle a gun?

10:16:30 9 **A.** Zero.

10:16:31 10 **Q.** Did anyone express to you their concerns about
10:16:36 11 Mr. Brockman's ability to handle a gun safely?

10:16:39 12 **A.** No.

10:16:39 13 **Q.** Was that an annual trip?

10:16:41 14 **A.** It was a regularly annual trip for officers --
10:16:45 15 senior officers.

10:16:46 16 **Q.** Did you also attend that trip in 2016?

10:16:50 17 **A.** I believe that's true.

10:16:52 18 **Q.** Okay. Was Evatt Tamine on that trip?

10:16:55 19 **A.** I believe that's correct, yes.

10:16:57 20 **Q.** And he was actually a roommate?

10:16:59 21 **A.** Yes.

10:16:59 22 **Q.** Did Mr. Tamine stay the entire time on that
10:17:02 23 trip?

10:17:02 24 **A.** No, he left a day or two early.

10:17:04 25 **Q.** Okay. Do you remember the reason he gave you

10:17:06 1 for why he left?

10:17:07 2 **A.** It was related to hurricane coming towards
10:17:11 3 Bermuda.

10:17:13 4 **Q.** All right. Now I'll take you to January of
10:17:16 5 2020. I'm going to show you what's been marked as
10:17:23 6 Government Exhibit 68.

10:17:24 7 **MR. LANGSTON:** Before I do that, I
10:17:25 8 offer 71, Your Honor.

10:17:26 9 **THE COURT:** Okay. Any objection?

10:17:28 10 **MS. KENEALLY:** No objection, Your
10:17:29 11 Honor.

10:17:29 12 **THE COURT:** Okay. That Government
10:17:31 13 Exhibit 71 is admitted.

10:17:34 14 **MR. LANGSTON:**

10:17:35 15 **Q.** This is -- we can zoom in on the top half of
10:17:38 16 the memo. Okay. This is an e-mail from
10:17:43 17 Mr. Brockman to you in -- or your copied on this
10:17:45 18 e-mail in January of 2020?

10:17:47 19 **A.** Okay.

10:17:48 20 **Q.** Is that true?

10:17:49 21 **A.** Let me look at it for a second. He sent this
10:17:56 22 to me.

10:17:56 23 **Q.** Okay. And can you give a brief description
10:17:59 24 here of what the issue is that Mr. Brockman is
10:18:01 25 weighing in on?

10:18:04 1 **A.** Yes, let me -- this relates to the paragraph
10:18:15 2 that starts, "I just don't want you to think we
10:18:18 3 don't fight for everyone like this. Your repeated
10:18:20 4 sermonizing on the subject makes it sound like we're
10:18:24 5 not doing our job."

10:18:25 6 That's what this is in reference
10:18:27 7 to.

10:18:27 8 **Q.** Okay. What's the broader dispute you were --
10:18:30 9 to use his words -- sermonizing about?

10:18:34 10 **A.** Yes, when the financial statements would be
10:18:36 11 prepared, I'd often create a cover e-mail. In the
10:18:40 12 cover e-mail, I would highlight things that needed
10:18:42 13 to be done or needed to be changed from a financial
10:18:46 14 standpoint.

10:18:46 15 We were losing customers at a rate
10:18:48 16 that was going to negatively impact the financials.
10:18:52 17 So I regularly pointed out we're losing too many
10:18:55 18 customers.

10:18:55 19 **Q.** What was Mr. Brockman's response to you?

10:18:57 20 **A.** This was the response to that.

10:18:58 21 **Q.** Okay. At this point in January of 2020, did
10:19:06 22 you have any reason to doubt -- to doubt
10:19:10 23 Mr. Brockman's mental competence?

10:19:12 24 **A.** None.

10:19:12 25 **Q.** And -- well, I understand you may disagree from

10:19:16 1 a business-judgment standpoint about what he's
10:19:19 2 telling you in this e-mail, was he getting any of
10:19:22 3 the facts wrong in this e-mail?

10:19:33 4 **A.** I didn't know the facts of this particular
10:19:40 5 deal, so I don't know if those -- but he was
10:19:44 6 justifying they were looking at every deal. So it
10:19:46 7 was an example of him controlling the sales force at
10:19:49 8 that point.

10:19:50 9 **MR. LANGSTON:** I'll offer 68, Your
10:19:54 10 Honor.

10:19:54 11 **MS. KENEALLY:** No objection.

10:19:54 12 **THE COURT:** Without objection,
10:19:57 13 Government Exhibit 68 is admitted.

10:19:58 14 **MR. LANGSTON:**

10:19:58 15 **Q.** I'm going to direct your attention to April 9th
10:20:01 16 of 2020. Are you aware that Mr. Brockman's counsel
10:20:05 17 sent a letter to the Government on that date?

10:20:09 18 **A.** April 9th?

10:20:09 19 **Q.** Yes.

10:20:10 20 **A.** Of --

10:20:11 21 **Q.** Of 2020.

10:20:12 22 **A.** No, I'm not aware of that.

10:20:13 23 **Q.** Okay. Let me ask you this. On April 9, 2020,
10:20:17 24 did Mr. Brockman tell you that he had concerns about
10:20:20 25 his mental -- mental abilities?

10:20:22 1 **A.** No.

10:20:23 2 **Q.** Are you aware of whether Mr. Brockman had a
10:20:26 3 disability retirement clause in his contract?

10:20:28 4 **A.** Yes.

10:20:29 5 **Q.** And did Mr. Brockman have any discussions with
10:20:33 6 you on or around April 9th about exercising that
10:20:35 7 retirement clause?

10:20:36 8 **A.** Not with Bob, no.

10:20:39 9 **Q.** Let's fast forward a month later then.

10:20:44 10 **MR. LANGSTON:** I'm sorry, Your Honor --

10:20:46 11 **Q.** Let's fast forward a month. I'd like to show
10:20:49 12 you Government Exhibit 69. Can you tell us what's
10:21:06 13 happening here in Government Exhibit 69?

10:21:08 14 **A.** Can you zoom in, please?

10:21:10 15 **Q.** Sure.

10:21:26 16 **A.** Yes, this is -- I'm copied on this e-mail,
10:21:30 17 along with Keith Hill (phonetic), which was the
10:21:33 18 executive vice president of sales, and Tommy Barris.

10:21:36 19 **Q.** This is an e-mail by Mr. Brockman on May 11,
10:21:40 20 2020?

10:21:40 21 **A.** Yes.

10:21:41 22 **Q.** Okay. Can you give us a brief description of
10:21:44 23 what the discussion that is happening here?

10:21:47 24 **A.** Yes, this is related to -- we had a product
10:21:50 25 that was related to an acquisition -- created -- it

10:21:54 1 was the IMN that was the newsletter business. Chris
10:21:58 2 Walsh was trying to salvage this business, and
10:22:01 3 asking to decrease prices to be able to sell it,
10:22:06 4 because sales force was responsible for selling
10:22:10 5 that.

10:22:10 6 And this -- so Chris had -- I had
10:22:13 7 worked with Chris to help him with some of the
10:22:15 8 margin information, and this is Bob's response. And
10:22:18 9 he was putting us all on notice we were going to run
10:22:21 10 this business into the ground.

10:22:25 11 Q. So Chris, Mr. Walsh, wanted to invest a little
10:22:29 12 bit more into this business and makes a proposal to
10:22:32 13 Mr. Brockman?

10:22:32 14 A. Precisely.

10:22:33 15 Q. This is Mr. Brockman's response?

10:22:36 16 A. Yes.

10:22:36 17 Q. This is the first -- the first three
10:22:39 18 paragraphs, if we can zoom in on that. Are you able
10:22:41 19 to see that right now?

10:22:42 20 A. Yes.

10:22:42 21 Q. Okay. What's Mr. Brockman's discussion about
10:22:45 22 margin here?

10:22:52 23 A. Well, he's saying in the first -- second
10:22:55 24 paragraph, second sentence that this makes profit
10:22:59 25 ten percent. It's probably right at zero. That's

10:23:01 1 -- he would say that there's that much information
10:23:04 2 that we don't have to say that if it's the ten
10:23:06 3 percent margin, it's really probably zero, and why
10:23:12 4 would we do anything that's at zero profit.

10:23:15 5 And then the second -- the third
10:23:17 6 line is -- 23 percent margin is also not acceptable,
10:23:21 7 and that was typical for our business. We had -- we
10:23:26 8 had, you know, margins in the hundreds of
10:23:28 9 percentiles. So, for a software company that's --
10:23:31 10 that's what he required.

10:23:32 11 Q. Okay. So those two paragraphs are his analysis
10:23:34 12 of the profitability of this newsletter?

10:23:38 13 A. That.

10:23:39 14 Q. Okay. Ask then, does he set forth kind of a
10:23:42 15 path forward?

10:23:43 16 A. Yes. Then he's -- the in the fourth paragraph
10:23:47 17 he says, "We need to exit in business gracefully,"
10:23:51 18 and that's what we were in the process of doing.

10:23:53 19 Q. Okay. Was there any action taken as a result
10:23:56 20 of Mr. Brockman's e-mail?

10:23:57 21 A. Not that I'm aware of. Would have been for
10:24:00 22 Chris Walsh to --

10:24:01 23 Q. Okay. Was -- was this Mr. Brockman's call to
10:24:05 24 make in May of 2020?

10:24:07 25 A. Absolutely.

10:24:09 1 MR. LANGSTON: I'll offer 69, Your
10:24:11 2 Honor.

10:24:11 3 THE COURT: Okay.

10:24:12 4 MS. KENEALLY: Your Honor, we're not
10:24:13 5 going to object to the fact these are e-mails
10:24:16 6 between Mr. Brockman and Mr. Moss. We do, at this
10:24:20 7 point, question the relevance of this as to
10:24:26 8 Mr. Brockman's competency today, and to what's
10:24:30 9 becoming rather cumulative nature of going through
10:24:33 10 these e-mails.

10:24:34 11 THE COURT: Okay. Objection overruled.

10:24:39 12 THE COURT: Which exhibit?

10:24:40 13 MR. LANGSTON: 69, Your Honor.

10:24:42 14 THE COURT: Government Exhibit 69 is
10:24:43 15 admitted.

10:24:44 16 MR. LANGSTON:

10:24:44 17 Q. Mr. Moss, are you familiar with something at
10:24:47 18 Reynolds and Reynolds called the executive
10:24:50 19 committee?

10:24:50 20 A. Yes, sir.

10:24:51 21 Q. What is the executive committee?

10:24:55 22 A. The executive committee was formed preceding
10:24:58 23 Tommy Barris's promotion, and it was a subject
10:25:00 24 matter of experts from each of the major areas. And
10:25:04 25 they created -- well, a pseudo board of directors to

10:25:10 1 be able to make decisions, and talk through
10:25:12 2 strategies and all of that.

10:25:14 3 Q. Okay. Who decided who the members of the
10:25:18 4 executive committee were?

10:25:19 5 A. Bob and Tommy.

10:25:21 6 Q. I'm going to direct your attention to June of
10:25:24 7 2020. Was there a -- was there announced June of
10:25:30 8 2020 a restructuring of the senior leadership of
10:25:33 9 Reynolds and Reynolds?

10:25:33 10 A. Yes.

10:25:33 11 Q. And did you get a different job as a result of
10:25:37 12 that?

10:25:38 13 A. I got the same job, different title.

10:25:41 14 Q. Okay.

10:25:43 15 Q. Was Mr. Barris promoted during that time
10:25:47 16 period?

10:25:47 17 A. Yes.

10:25:47 18 Q. Okay. Following this restructuring -- I'll
10:25:52 19 show you Government 51. Is this an e-mail between
10:26:04 20 you and Mr. Brockman in July of 2020?

10:26:06 21 A. That's correct.

10:26:07 22 Q. Okay. So this is after that restructuring we
10:26:09 23 discussed?

10:26:10 24 A. Yes.

10:26:10 25 Q. And you are discussing what his salary is going

10:26:13 1 to be that year?

10:26:14 2 **A.** His bonus.

10:26:15 3 **Q.** His bonus. Was there any change in his
10:26:18 4 compensation package from before this restructuring
10:26:21 5 to after the restructuring?

10:26:23 6 **A.** Not at that point, no.

10:26:25 7 **Q.** Who was the CEO of Reynolds and Reynolds before
10:26:27 8 the restructuring?

10:26:28 9 **A.** Bob Brockman.

10:26:29 10 **Q.** Who was the CEO of Reynolds and Reynolds after
10:26:33 11 the restructuring?

10:26:33 12 **A.** Bob Brockman.

10:26:34 13 **Q.** Who was the chairman before?

10:26:36 14 **A.** Bob Brockman.

10:26:37 15 **Q.** Who was the chairman after?

10:26:38 16 **A.** Bob Brockman.

10:26:40 17 **Q.** Okay. In August of 2020, did --

10:26:44 18 MR. LANGSTON: We'll offer 51, Your
10:26:46 19 Honor.

10:26:46 20 THE COURT: Same objection?

10:26:47 21 MS. KENEALLY: Same objection.

10:26:48 22 THE COURT: Objection overruled.

10:26:51 23 Government Exhibit 51 is admitted.

10:26:54 24 MR. LANGSTON:

10:26:55 25 **Q.** Directing your attention to August of 2020, did

10:26:58 1 the company issue a dividend in August of 2020?

10:27:02 2 **A.** That's correct.

10:27:04 3 **Q.** And can you give us sort of a -- can you give
10:27:07 4 us a brief description of the circumstances leading
10:27:10 5 up to that dividend?

10:27:12 6 **A.** The dividend was -- the trust had run out of --
10:27:19 7 run out of money, or their funds were frozen so they
10:27:22 8 couldn't make payments to the recipients of the
10:27:25 9 dividend. And we were asked --

10:27:30 10 **Q.** I'm sorry, Mr. Moss. Having trouble hearing.
10:27:32 11 Sorry, go ahead. Trust was running --

10:27:35 12 **A.** The trust was either out of money or wasn't
10:27:38 13 able to access their money, and we were asked to
10:27:40 14 step into their shoes and make payments to the
10:27:42 15 beneficiaries.

10:27:44 16 **Q.** And did you believe that was a good idea?

10:27:46 17 **A.** Believed that was a bad idea.

10:27:48 18 **Q.** Okay. So what did you want to do instead?

10:27:50 19 **A.** Instead -- I didn't have an instead. I just --
10:27:54 20 they were trying to do that -- they were treating it
10:27:56 21 as extremely urgent. And Bob had taught us over the
10:27:59 22 years that if something is urgent, you need to pause
10:28:03 23 and not act on it.

10:28:05 24 And so I did exactly that, and I
10:28:07 25 objected to that because they were trying to do that

10:28:09 1 at the point with -- without any board resolutions.

10:28:14 2 Q. So you wanted -- rather than making the
10:28:16 3 payments directly, a dividend to be declared and go
10:28:18 4 through the proper channels?

10:28:20 5 A. Yes, makings the payments was not the issue.
10:28:23 6 Making sure the paperwork was in place.

10:28:25 7 Q. Okay. What was the total amount of the
10:28:27 8 dividend? Why don't I put 52 up on the screen. If
10:28:40 9 we can zoom in on that first paragraph, I believe --
10:28:48 10 sorry, the next one. First big one. Was it about
10:28:56 11 eleven and a half million dollars?

10:29:01 12 A. Yes.

10:29:02 13 Q. And so this is the declaration that you wanted
10:29:06 14 to have happen, Exhibit 52?

10:29:08 15 A. Yes.

10:29:08 16 Q. Declaring an \$11 million dividend?

10:29:11 17 A. Yes.

10:29:12 18 Q. Who signed this paperwork?

10:29:17 19 A. We can --

10:29:20 20 Q. Why don't I show you Page 2.

10:29:26 21 A. Yes. Bob Brockman.

10:29:30 22 Q. Why was he one of the people that had to sign
10:29:33 23 this?

10:29:33 24 A. He was a board -- member of the board of
10:29:37 25 directors.

10:29:37 1 Q. Okay. So in August in -- August 13th of 2020,
10:29:43 2 did Mr. Brockman express concern to you about his
10:29:46 3 qualification to authorize this eleven and a half
10:29:48 4 million dollar dividend?

10:29:49 5 A. No.

10:29:50 6 Q. Did anyone at the company express concerns
10:29:52 7 about Mr. Brockman's qualification or ability to
10:29:54 8 sign this document?

10:29:55 9 A. No.

10:29:56 10 Q. At some point, did you learn --

10:29:58 11 MR. LANGSTON: We'll offer 52, Your
10:30:00 12 Honor. I'm sorry.

10:30:00 13 THE COURT: Okay. Objection?

10:30:02 14 MS. KENEALLY: No objection.

10:30:05 15 THE COURT: Same objection?

10:30:06 16 MS. KENEALLY: No objection.

10:30:07 17 THE COURT: Okay. No objection.

10:30:09 18 Government Exhibit 52 is admitted.

10:30:13 19 MR. LANGSTON:

10:30:13 20 Q. And at some point, did you learn the board of
10:30:16 21 directors had changed?

10:30:18 22 A. It was after this, yes.

10:30:19 23 Q. Was that in November of 2020?

10:30:21 24 A. That sounds about right.

10:30:22 25 Q. Okay. Who were the new director?

10:30:26 1 **A.** The new director Tommy Barris and Jim Jackson.

10:30:35 2 **Q.** Are you familiar with who Tommy Barris is?

10:30:38 3 **A.** Painfully.

10:30:40 4 **Q.** What is Mr. Barris's relationship to
10:30:42 5 Mr. Brockman?

10:30:43 6 **A.** Um, he was executive vice president of software
10:30:46 7 development, and had worked with Bob for 30-plus
10:30:50 8 years.

10:30:50 9 **Q.** Who is Jim Jackson?

10:30:52 10 **A.** Jim Jackson was the preacher at Chapelwood
10:31:00 11 United Methodist Church and came on board with us to
10:31:02 12 be our corporate spiritual guidance person or
10:31:06 13 something to that effect.

10:31:06 14 **Q.** Was Mr. Brockman and Mr. Barris -- were they
10:31:11 15 congregates at Chapelwood Church?

10:31:12 16 **A.** That's my understanding.

10:31:13 17 **Q.** And other than his relationship with
10:31:15 18 Mr. Brockman and Mr. Barris, did Mr. Jackson have
10:31:16 19 any qualifications to be on the board of directors
10:31:17 20 of a software company?

10:31:18 21 **A.** Zero.

10:31:20 22 **Q.** And was the executive committee consulted about
10:31:24 23 placing Mr. Jackson on the board?

10:31:25 24 **A.** Not at all.

10:31:26 25 **Q.** I'll direct your attention now to November 13th

10:31:30 1 of 2020, and we'll put Exhibit 70 up on the screen.
10:31:46 2 So this is an e-mail from Mr. Brockman to you on
10:31:49 3 November 13th of 2020?

10:31:50 4 **A.** Yes.

10:31:51 5 **Q.** Was this e-mail sent to you before or after you
10:31:55 6 learned of Mr. Brockman's indictment?

10:31:59 7 **A.** That would be after.

10:32:00 8 **Q.** And can you give a brief sort of description of
10:32:06 9 the background behind Mr. Brockman's son being on
10:32:10 10 the Reynolds's healthcare plan?

10:32:15 11 **A.** Yes, his son had been on the medical plan for
10:32:17 12 years and years. At the time, I was CFO, he --
10:32:21 13 became CFO he was already on that plan. Then
10:32:25 14 shortly -- he got married. His wife had a baby.

10:32:29 15 This all kind of came to a head at
10:32:31 16 that point. I had on my -- on my review -- or
10:32:35 17 regular review was to prepare the company for sale.
10:32:39 18 He had both his son, daughter-in-law, and baby, as
10:32:44 19 well as household staff on the medical plan. We
10:32:47 20 were trying to clear that up, because that wasn't
10:32:50 21 the way that was supposed to happen.

10:32:51 22 **Q.** Okay. At the time in 2020 when they were on
10:32:55 23 the medical plan, were any of them employees of
10:32:57 24 Reynolds's?

10:32:59 25 **A.** No.

10:33:00 1 Q. As a general rule, do you have to be an
10:33:02 2 employee of the company to be on their healthcare
10:33:04 3 plan?

10:33:04 4 A. Yes.

10:33:05 5 Q. Okay. So in November of 2020, what was
10:33:09 6 Mr. Brockman asking you to do?

10:33:10 7 A. In this e-mail?

10:33:11 8 Q. Yes.

10:33:12 9 A. He's not -- I don't believe he's -- oh, he's
10:33:15 10 asking me to submit a report of how much money he
10:33:18 11 owed us for the back -- back previous years that
10:33:22 12 these people were on the plan and hadn't been paying
10:33:25 13 for it.

10:33:26 14 Q. So this is sort of -- this is helping to
10:33:31 15 resolve the issue?

10:33:32 16 A. Yes.

10:33:32 17 Q. Related to the healthcare plan?

10:33:34 18 A. It was a cleanup process.

10:33:36 19 Q. Okay.

10:33:42 20 MR. LANGSTON: I'll offer Exhibit 70,
10:33:43 21 Your Honor.

10:33:43 22 THE COURT: Okay. Objection?

10:33:45 23 MS. KENEALLY: No objection.

10:33:46 24 MR. LANGSTON: No further questions.

10:33:47 25 THE COURT: Government Exhibit 70 is

10:33:48 1 admitted.

10:33:49 2 MR. LANGSTON: Sorry. No further
10:33:51 3 questions, Your Honor. Thank you.

10:33:57 4 THE COURT: You may proceed whenever
10:33:58 5 you are ready.

10:33:58 6 **CROSS-EXAMINATION**

10:33:58 7 **BY MS. KENEALLY:**

10:34:03 8 **Q.** Good morning, Mr. Moss.

10:34:04 9 **A.** Morning.

10:34:04 10 **Q.** We've never spoken before; correct?

10:34:06 11 **A.** I don't believe so.

10:34:07 12 **Q.** I'm sorry, I'm having trouble hearing you?

10:34:10 13 **A.** I don't believe so. I don't know what your
10:34:11 14 name is.

10:34:12 15 **Q.** My name is Kathy Keneally. Good morning,
10:34:15 16 Mr. Moss. Do you remember speaking with me before?

10:34:17 17 **A.** I do not believe so.

10:34:18 18 **Q.** Have you ever spoken with any member of the
10:34:21 19 defense legal team?

10:34:23 20 **A.** Not that I'm aware of.

10:34:25 21 **Q.** You did speak with the Government, though;
10:34:26 22 correct?

10:34:27 23 **A.** Yes.

10:34:27 24 **Q.** Um, how many occasions have you spoken with the
10:34:30 25 Government?

10:34:31 1 **A.** Two.

10:34:32 2 **Q.** And when was the first time?

10:34:34 3 **A.** June of 2019, I believe.

10:34:38 4 **Q.** Second time?

10:34:40 5 **A.** Week ago.

10:34:48 6 **Q.** Fair to say Mr. Brockman had reduced his
10:34:50 7 involvement in Reynolds and Reynolds in the last few
10:34:52 8 years? Stepping back? Slowing down?

10:34:56 9 **A.** Certainly did after the indictments -- or
10:34:58 10 subpoenas had been issued, yes.

10:35:00 11 **Q.** Well, prior to the indictment?

10:35:03 12 **A.** Shortly before the indictment, his -- his -- he
10:35:07 13 did not come to the office as often and he was, you
10:35:11 14 know -- his access was limited.

10:35:13 15 **Q.** When -- when you met with the Government in
10:35:16 16 June of 2020, do you recall telling the Government
10:35:19 17 that Mr. Brockman had been slowing down for about
10:35:22 18 two years prior to that?

10:35:24 19 **A.** No, I don't recall that.

10:35:25 20 **Q.** You don't remember saying that to the
10:35:26 21 Government?

10:35:27 22 **A.** No.

10:35:29 23 **Q.** Have you been told Bob has Parkinson's disease?

10:35:31 24 **A.** Yes.

10:35:32 25 **Q.** When did you learn that?

10:35:32 1 **A.** Jim Jackson told me that on a return trip from
10:35:40 2 Dayton. I don't recall the date.

10:35:44 3 **Q.** Approximate date? Year?

10:35:48 4 **A.** 2019, 2020 -- one of those.

10:35:55 5 **Q.** So Reynolds and Reynolds -- who owns Reynolds
10:36:00 6 and Reynolds?

10:36:00 7 **A.** The trust.

10:36:01 8 **Q.** So immediately above Reynolds and Reynolds,
10:36:04 9 that would be --

10:36:05 10 **A.** UCSH.

10:36:06 11 **Q.** Universal Computers Services Holding?

10:36:08 12 **A.** Yes.

10:36:08 13 **Q.** Above that UCSH?

10:36:10 14 **A.** Yes.

10:36:11 15 **Q.** UCSH is? I get this wrong every time.

10:36:14 16 **A.** The name?

10:36:15 17 **Q.** Yeah.

10:36:15 18 **A.** Universal Computer Systems Holding.

10:36:22 19 **Q.** And where are those companies located?

10:36:26 20 **A.** The US, Delaware.

10:36:29 21 **Q.** Where are the business operations?

10:36:30 22 **A.** Houston and Dayton, Ohio.

10:36:36 23 **Q.** Approximately how many people do they employ at
10:36:38 24 those locations?

10:36:39 25 **A.** About 4,500 employees.

10:36:44 1 Q. And --

10:36:45 2 A. I'm sorry, go ahead.

10:36:46 3 Q. And they're all -- all three of those, they're
10:36:48 4 US tax-paying entities; correct?

10:36:51 5 A. Yes, always.

10:36:51 6 Q. And who owns UCSH?

10:36:55 7 A. Spanish Steps. Spanish Steps and Pilot.

10:37:04 8 Q. And ultimately, Spanish Steps is owned by the
10:37:10 9 A. Eugene Brockman Charitable Trust; is that
10:37:11 10 correct?

10:37:11 11 A. That's my understanding.

10:37:12 12 Q. You've known that for a long time; correct?

10:37:15 13 A. Yes.

10:37:15 14 Q. Not a secret from you?

10:37:16 15 A. No.

10:37:17 16 Q. And, in fact, it's something you've disclosed;
10:37:21 17 correct -- openly disclosed the offshore structure
10:37:25 18 of the ownership of these US companies; correct?

10:37:27 19 A. To that level, yes.

10:37:47 20 Q. Now, you -- you mentioned the dividend payments
10:37:58 21 that were made in -- some time in 2020; is that
10:38:04 22 correct?

10:38:04 23 A. Yes.

10:38:04 24 Q. And it's my understanding those dividend
10:38:08 25 payments -- those dividends had been made by the

10:38:10 1 company?

10:38:11 2 **A.** That's correct.

10:38:11 3 **Q.** Which company?

10:38:12 4 **A.** I believe that was DCS.

10:38:15 5 **Q.** And were those dividend payments made to the
10:38:19 6 shareholder, or were they made to pay obligations of
10:38:26 7 the shareholder?

10:38:27 8 **A.** That's correct.

10:38:27 9 **Q.** Choice --

10:38:28 10 **A.** The second one.

10:38:29 11 **Q.** The second one. So the dividend payments made
10:38:31 12 in 2020 were made -- obligations ultimately of the

10:38:35 13 **A.** Eugene Brockman Charitable Trust?

10:38:38 14 **A.** That's my understanding, yes.

10:38:40 15 **Q.** Am I right those dividend payments went to
10:38:44 16 charities?

10:38:45 17 **A.** Charities and schools.

10:38:46 18 **Q.** Charities and schools?

10:38:47 19 **A.** Yes.

10:38:47 20 **Q.** Based primarily in Houston; correct?

10:38:51 21 **A.** Primarily, yes.

10:38:53 22 **Q.** So basically what had happened was the trust
10:38:56 23 had made commitments to make charitable

10:38:59 24 contributions, and those charitable contributions --

10:39:01 25 the trust ran into a financial liquidity issue so

10:39:05 1 the company made those charitable contributions;
10:39:08 2 correct?

10:39:08 3 **A.** That's correct.

10:39:09 4 THE COURT: Before we go any further, I
10:39:10 5 want everyone to understand, I'm not stopping your
10:39:13 6 examination, but if the Government starts getting
10:39:15 7 into the merits, I don't want to hear Defense
10:39:17 8 counsel arguing that we're -- that this is a
10:39:20 9 competency hearing and we're not getting into the
10:39:21 10 merits. So you are free to examine the witness as
10:39:26 11 you wish, but I want to let everyone know if the
10:39:28 12 Government starts getting into the merits of this
10:39:30 13 case, I'm not going to shut them down because we're
10:39:34 14 getting there now.

10:39:37 15 MS. KENEALLY: Your Honor, I do not
10:39:38 16 believe any of these issues have to do with the
10:39:42 17 merits of the case at all. These are activities
10:39:45 18 that happened after the events in the indictment.
10:39:48 19 Um, the Government asked questions about decisions
10:39:51 20 made about the operations of the company, and I
10:39:53 21 wanted to put those in context.

10:39:55 22 Because certain issues were left
10:39:57 23 hanging, in terms of how things were operating.

10:40:02 24 THE COURT: Sure. Not a problem. I --

10:40:04 25 MS. KENEALLY: More than ready to move

10:40:06 1 on.

10:40:06 2 THE COURT: I'm letting everyone go on,
10:40:08 3 but I'm saying we're pushing very close. Based on
10:40:10 4 my understanding of the indictment and what's been
10:40:13 5 argued so far, we're going toward talking about the
10:40:16 6 merits of the case, and about certain transactions
10:40:20 7 that were part -- that the Government was alleging
10:40:23 8 was or was not appropriate.

10:40:25 9 So I'm letting you guys know that
10:40:27 10 if it comes up, then what's good for the goose is
10:40:30 11 good for the gander.

10:40:34 12 MS. KENEALLY: Your Honor, if it comes
10:40:35 13 up, we can have that conversation then. I do
10:40:40 14 represent these are activities taking place after
10:40:45 15 the indictment. They're not part of the indictment,
10:40:47 16 and they are part of what he was asked on direct.

10:40:50 17 THE COURT: Definitely. I'm saying
10:40:52 18 we're pushing toward that arena. So continue on.

10:40:55 19 MS. KENEALLY:

10:40:55 20 Q. And just -- the -- the questions that you were
10:41:06 21 asked about the insurance -- the insurance payments,
10:41:09 22 medical insurance payments --

10:41:10 23 A. I'm sorry?

10:41:11 24 Q. Remember you were being asked questions
10:41:16 25 about healthcare insurance; correct?

10:41:16 1 **A.** Related to his household staff.

10:41:17 2 **Q.** And to the family?

10:41:18 3 **A.** Yes.

10:41:18 4 **Q.** And so the company was made whole? Those
10:41:21 5 payments were re-made?

10:41:22 6 **A.** I believe so.

10:41:26 7 **Q.** You no longer work for Reynolds; do you?

10:41:36 8 **A.** That's correct.

10:41:39 9 **Q.** Did Mr. Barris ask you to leave Reynolds?

10:41:43 10 **A.** It was a result of a discussion that we had in
10:41:49 11 Dayton on the last trip to Dayton. And I -- he said
10:41:52 12 that I had to make a decision, and I made that
10:41:54 13 decision.

10:42:02 14 **Q.** When was the last time you saw Bob Brockman,
10:42:05 15 prior to today?

10:42:06 16 **A.** Probably August of last year.

10:42:10 17 **Q.** So over a year ago?

10:42:11 18 **A.** Yes.

10:42:13 19 MS. KENEALLY: No further questions.

10:42:15 20 MR. LANGSTON: No redirect, Your Honor.

10:42:16 21 The witness can be excused.

10:42:17 22 THE COURT: Thank you, Mr. Moss.

10:42:19 23 Appreciate it, sir. Thank you for your patience.

10:42:24 24 THE WITNESS: Absolutely. Thank you.

10:42:35 25 MR. LANGSTON: The Government calls

10:42:37 1 Evatt Tamine.

10:43:10 2 THE COURT: Mr. Tamine, if you could
10:43:15 3 step forward, sir. If you could, just raise your
10:43:17 4 right hand.

10:43:17 5 EVATT TAMINE,

10:43:17 6 (For the Government)

10:43:17 7 called as a Witness, having been duly
10:43:17 8 and regularly sworn, testified as follows:

10:43:26 9 THE WITNESS: I do.

10:43:27 10 THE COURT: Please take the stand, sir.
10:43:29 11 When you are on the stand, can you take your mask
10:43:31 12 off. It's not a problem.

10:43:33 13 THE WITNESS: Thank you, Your Honor.

10:43:33 14 DIRECT EXAMINATION

10:43:33 15 BY MR. LANGSTON:

10:43:48 16 Q. Good morning, sir. Could you state your name,
10:43:50 17 spelling your last name for the record.

10:43:52 18 A. Evatt Tamine, T-A-M-I-N-E.

10:43:55 19 Q. And, Mr. Tamine, were you offered a job that
10:43:59 20 involved you have moving to Bermuda in 2003?

10:44:02 21 A. I was.

10:44:03 22 Q. Who offered you that job?

10:44:05 23 A. Mr. Bob Brockman.

10:44:06 24 Q. Was Mr. Bob Brockman your official employer?

10:44:08 25 A. No, he wasn't.

10:44:09 1 Q. Who was your employer on paper?

10:44:11 2 A. A company called Tangarra Consultants Limited.

10:44:15 3 Q. In reality, who did you view your employer to

10:44:18 4 be?

10:44:18 5 A. I considered Mr. Brockman as my employer.

10:44:20 6 Q. How long did you work for Mr. Brockman?

10:44:22 7 A. About 14 years, from -- from that period for

10:44:26 8 about 14 years.

10:44:27 9 Q. So from 2003 to about 2018?

10:44:31 10 A. January 2004.

10:44:33 11 Q. During the 14 years you worked for

10:44:36 12 Mr. Brockman, did you submit formal performance

10:44:39 13 reviews to him?

10:44:39 14 A. I did.

10:44:40 15 Q. Did Mr. Brockman formally evaluate your

10:44:45 16 performance on an annual basis?

10:44:48 17 A. Roughly on an annual basis.

10:44:50 18 Q. Were these reviews that Mr. Brockman gave

10:44:51 19 you -- were they written or oral?

10:44:52 20 A. Written and oral.

10:44:53 21 Q. Who set your salary?

10:44:55 22 A. Mr. Brockman.

10:44:56 23 Q. What was your starting compensation when you

10:45:00 24 moved to Bermuda in 2004?

10:45:02 25 A. I think it was about \$150,000 with benefits.

10:45:07 1 Q. What was your total compensation the last full
10:45:10 2 year you worked for him?

10:45:11 3 A. \$2.6 million.

10:45:12 4 Q. As part of your duties and respondents while
10:45:14 5 working for Mr. Brockman, did you help administer
10:45:17 6 the A. Eugene Brockman Charitable Trust?

10:45:22 7 A. I did.

10:45:22 8 Q. Can we call that The Brockman Trust to save the
10:45:26 9 court reporter?

10:45:26 10 A. Yes.

10:45:27 11 Q. What was the name of the trustee of The
10:45:30 12 Brockman Trust?

10:45:30 13 A. St. John's Trust Company, PVT, Limited.

10:45:37 14 Q. And -- so this was a corporate trust company?

10:45:41 15 A. A corporate trustee.

10:45:44 16 Q. Prior to 2010, who was the director of
10:45:48 17 St. John's?

10:45:48 18 A. There were several directors, but the main
10:45:51 19 director was a man by the name of Gordon Howard.

10:45:55 20 Q. As part of your duties, were you responsible
10:45:57 21 for passing on direction to Mr. Howard?

10:46:00 22 A. Yes, from time to time.

10:46:01 23 Q. Beginning in 2010, who was the director of the
10:46:06 24 St. John's Trust Company?

10:46:08 25 A. At some point in 2010 -- I think in August -- I

10:46:10 1 became director as as well.

10:46:13 2 Q. Who directed you to become the director?

10:46:15 3 A. Mr. Brockman.

10:46:16 4 Q. And as the director of the St. John's Trust
10:46:20 5 Company, were you, on paper, the person who
10:46:23 6 controlled The Brockman Trust?

10:46:24 7 A. I was the director of the trustee, yes.

10:46:27 8 Q. In reality, who controlled and gave direction
10:46:31 9 to the trust?

10:46:32 10 A. Directions were given from time to time by
10:46:35 11 Mr. Brockman.

10:46:35 12 Q. And who made all of these substantive and
10:46:40 13 strategic decisions?

10:46:41 14 A. For the most part it was Mr. Brockman.

10:46:42 15 Q. And did anything material ever happen in
10:46:45 16 relation to The Brockman Trust that was not ordered
10:46:47 17 or approved by Mr. Brockman?

10:46:49 18 A. For the most of the time, no.

10:46:52 19 Q. Are you familiar with an entity known as Point
10:46:55 20 Investments?

10:46:55 21 A. I am.

10:46:56 22 Q. What is Point Investments?

10:46:58 23 A. It is a private mutual fund.

10:47:01 24 Q. What is the relationship between Point
10:47:03 25 Investments and The Brockman Trust?

10:47:05 1 **A.** An entity that is owned -- ultimately owned by
10:47:09 2 The Brockman Trust is an investor into Point
10:47:11 3 Investments.

10:47:12 4 **Q.** Okay. So Point Investments is the bottom, and
10:47:15 5 The Brockman Trust is at the top?

10:47:16 6 **A.** Yes, effectively.

10:47:19 7 **Q.** Simplifying a little bit. During the 14 years
10:47:22 8 you worked for Mr. Brockman, did Point Investments
10:47:26 9 have investments in Vista Equity Partners?

10:47:32 10 **A.** Yes.

10:47:32 11 **Q.** And were those investments profitable?

10:47:35 12 **A.** Yes.

10:47:35 13 **Q.** Were the profits greater or less than
10:47:39 14 \$1 billion?

10:47:39 15 **A.** They were greater.

10:47:41 16 **Q.** As far as you were aware, were any of these
10:47:43 17 profits ever reported on a US tax return?

10:47:46 18 **A.** I'm not aware.

10:47:48 19 **Q.** Are you familiar with a company known as
10:47:50 20 Universal Computer Systems, and then later becoming
10:47:54 21 Reynolds and Reynolds?

10:47:55 22 **A.** Yes.

10:47:55 23 **Q.** Who was the CEO of Reynolds and Reynolds?

10:47:57 24 **A.** Mr. Brockman.

10:47:58 25 **Q.** Was Reynolds and Reynolds an asset of the

10:48:00 1 trust?

10:48:01 2 **A.** Yes.

10:48:02 3 **Q.** And was -- at the time you concluded in 2018,
10:48:10 4 was Reynolds and Reynolds worth more or less than
10:48:13 5 \$5 billion?

10:48:13 6 **A.** Hard to say. I don't know.

10:48:16 7 **Q.** Okay. In addition to The Brockman Trust, were
10:48:19 8 you also directed by Mr. Brockman to oversee other
10:48:22 9 offshore structures?

10:48:23 10 **A.** Yes.

10:48:24 11 **Q.** And did one of those structures purchase a
10:48:28 12 yacht called the Turmoil, and I think later renamed
10:48:31 13 the Albula?

10:48:33 14 **A.** Yes.

10:48:33 15 **Q.** Who made the decision to purchase the yacht?

10:48:35 16 **A.** The decision came from Mr. Brockman.

10:48:38 17 **Q.** Did one of those structures own property in
10:48:40 18 Aspen, and a fishing ranch in Colorado?

10:48:43 19 **A.** Yes.

10:48:43 20 **Q.** Who was the primary user of those properties?

10:48:46 21 **A.** The person who rented the properties was
10:48:48 22 Mr. Brockman.

10:48:49 23 **Q.** Okay. Who gave the direction concerning those
10:48:51 24 properties?

10:48:51 25 **A.** I don't know about the first property, because

10:48:53 1 I wasn't working at the time, but in relation to the
10:48:56 2 second property, the fishing property, it was
10:48:58 3 Mr. Brockman.

10:48:59 4 Q. And the first property, the Aspen property, was
10:49:03 5 Mr. Brockman the only lessee?

10:49:08 6 A. Yes, he paid full rent for the property.

10:49:11 7 Q. Did you do a large scanning project on behalf
10:49:14 8 of Mr. Brockman?

10:49:15 9 A. Yes.

10:49:18 10 Q. What documents did you scan?

10:49:20 11 A. Every document that existed anywhere in
10:49:22 12 relation to any of the entities.

10:49:24 13 Q. Okay. Was this a one-time project or was it an
10:49:28 14 ongoing task?

10:49:29 15 A. It was an ongoing task.

10:49:30 16 Q. And as part of the scanning project -- or part
10:49:33 17 of this ongoing task, did you save all of the
10:49:36 18 correspondence between you and Mr. Brockman?

10:49:38 19 A. It was my practice to save everything, yes.

10:49:40 20 Q. Okay. Did you generally either scan or add
10:49:44 21 electronic copies of new documents that were being
10:49:48 22 created?

10:49:48 23 A. Yeah. As best I could, yes.

10:49:50 24 Q. And did you do this at or near the time they
10:49:53 25 were created?

10:49:54 1 **A.** I tried to.

10:49:55 2 **Q.** Did you save your performance reviews?

10:49:57 3 **A.** Yes.

10:49:58 4 **Q.** Did you save your to-do lists from

10:50:01 5 Mr. Brockman?

10:50:02 6 **A.** Yes.

10:50:05 7 **Q.** Did you save memos you and Mr. Brockman wrote
10:50:07 8 back and forth to each other?

10:50:08 9 **A.** Yes.

10:50:09 10 **Q.** Was Mr. Brockman aware that you were saving all
10:50:12 11 of this?

10:50:12 12 **A.** Yes.

10:50:14 13 **Q.** I'd like to direct your attention to

10:50:16 14 September 5, 2018. What happened that day?

10:50:20 15 **A.** I was in the United Kingdom when I received a
10:50:24 16 phone call that a search warrant had been executed
10:50:26 17 at my home office in Bermuda.

10:50:29 18 **Q.** Was there a copy of that master document file
10:50:32 19 we just discussed inside your house that day?

10:50:35 20 **A.** Yes.

10:50:35 21 **Q.** Did you also have a copy of that with you?

10:50:38 22 **A.** Yes.

10:50:39 23 **Q.** So that master documents file included all of
10:50:44 24 the documents you had scanned from Mr. Brockman; is
10:50:46 25 that fair?

10:50:46 1 **A.** Yes.

10:50:46 2 **Q.** As well as all of the correspondence?

10:50:48 3 **A.** Yes.

10:50:49 4 **Q.** And subsequent to the search warrant, do you
10:50:53 5 provide a copy of that file to the Government
10:50:55 6 through your lawyers?

10:50:56 7 **A.** Yes.

10:50:57 8 **Q.** And do they provide a record spanning 14-year
10:51:02 9 employment with Mr. Brockman?

10:51:02 10 **A.** Yes.

10:51:03 11 **Q.** And do those records reflect the direction he
10:51:05 12 exercised over the trust?

10:51:06 13 **A.** It -- it reflects directions given by
10:51:10 14 Mr. Brockman from time to time, yes.

10:51:11 15 **Q.** Okay. Mr. Tamine, did you sign an immunity
10:51:16 16 agreement with the Government?

10:51:17 17 **A.** I did.

10:51:17 18 **Q.** And what are the terms, as you understand, to
10:51:20 19 that agreement?

10:51:21 20 **A.** I am to give full and frank answers and assist
10:51:24 21 the Department of Justice and appear as needed. But
10:51:29 22 I have no immunity from perjury.

10:51:33 23 **Q.** Let's look at the some of the documents that
10:51:35 24 were on that hard drive. I'm going to show you
10:51:38 25 Exhibit 10. Do you recognize Exhibit 10?

10:52:03 1 **A.** Yes, it is an e-mail -- e-mail exchanges
10:52:06 2 between me and Mr. Brockman.

10:52:08 3 **Q.** We're zooming in on the top portion, which is
10:52:11 4 sort of the "To or From" section.

10:52:14 5 Who is Permit?

10:52:16 6 **A.** Mr. Brockman.

10:52:16 7 **Q.** And who is Red Rish?

10:52:18 8 **A.** Me.

10:52:19 9 **Q.** Over the 14 years you worked for Mr. Brockman
10:52:25 10 did anyone -- was there another Permit, other than
10:52:27 11 Mr. Brockman?

10:52:27 12 **A.** No.

10:52:28 13 **Q.** Was there another Red Rish, other than you?

10:52:30 14 **A.** No.

10:52:31 15 **Q.** What is lambdaprime.org?

10:52:34 16 **A.** An e-mail server we were using for a period.

10:52:36 17 **Q.** Was that e-mail server encrypted?

10:52:41 18 **A.** Yes.

10:52:41 19 **Q.** Was that a series of e-mail systems you used to
10:52:44 20 communicate with Mr. Brockman?

10:52:45 21 **A.** Yes.

10:52:45 22 **Q.** Whose decision was it for you and Mr. Brockman
10:52:49 23 to communicate using these encrypted servers?

10:52:52 24 **A.** Mr. Brockman's.

10:52:53 25 **Q.** And do you know why he wanted the security --

10:52:56 1 these security systems in place for your
10:52:59 2 communications between him and you?

10:53:01 3 **A.** To the best of my knowledge, Mr. Brockman was
10:53:03 4 very keen on security. Um, for a number of reasons
10:53:07 5 he was very keen on privacy.

10:53:10 6 **Q.** Was one of those reasons that he wanted to
10:53:12 7 prevent government agencies from knowing he was
10:53:14 8 communicating and giving you direction?

10:53:16 9 **A.** Well, he wanted our communications, yes, not to
10:53:19 10 be seen by government bodies.

10:53:23 11 **Q.** Were your e-mails, including this e-mail from
10:53:26 12 these part of the documents, seized at your Bermuda
10:53:30 13 home and that you gave to the US Government in
10:53:33 14 September of 2018?

10:53:33 15 **A.** I can't say which one this came from. But,
10:53:36 16 yes, it is from one of those.

10:53:37 17 **Q.** Okay. Let's go to the last page of the
10:53:39 18 document. If we can zoom in on the first-in-time
10:53:50 19 e-mail. This is an e-mail from Mr. Brockman to you?

10:53:55 20 **A.** Yes.

10:53:55 21 **Q.** Okay. And he says to you, "Have you considered
10:53:59 22 the security issues with moving the laptops to
10:54:02 23 Bermuda, especially the big-image documents file"?

10:54:06 24 **A.** Yes.

10:54:07 25 **Q.** And that big-image documents file is the backup

10:54:10 1 that we've been discussing?

10:54:11 2 **A.** Yes.

10:54:12 3 **Q.** Why did Mr. Brockman say that he would expect
10:54:16 4 that you would not be connecting through the United
10:54:19 5 States?

10:54:19 6 **A.** I can't say for sure. Um, I was coming from
10:54:23 7 Europe, and I -- I can't say. I imagine because I
10:54:32 8 was flying through Britain.

10:54:35 9 **Q.** Was this a concern that Mr. Brockman had that
10:54:37 10 the document file not be seized by US Customs?

10:54:41 11 **A.** Yes, possibly.

10:54:42 12 **Q.** Let's go to -- actually look at the bottom.

10:54:50 13 **A.** Yes.

10:54:50 14 **Q.** Okay. There's a "P.S."

10:54:53 15 What is "PGP"?

10:54:55 16 **A.** I believe stands -- it's an encryption
10:54:57 17 software. I think it stands for Pretty Good
10:54:59 18 Privacy.

10:55:00 19 **Q.** What is Radmin?

10:55:02 20 **A.** Another software package. It's a remote access
10:55:05 21 software package.

10:55:06 22 **Q.** That's a software package that allows a person
10:55:08 23 to access a computer in another location over the
10:55:11 24 internet?

10:55:11 25 **A.** Yes.

10:55:11 1 Q. And at this point in 2010, where were you
10:55:15 2 living?

10:55:16 3 A. In Geneva. Can I double check? No, I might
10:55:23 4 have been living back in Bermuda at this point.

10:55:26 5 Q. Well, this is an e-mail discussing you moving
10:55:28 6 from Switzerland to Bermuda?

10:55:31 7 A. I was looking at the date. I thought I
10:55:34 8 returned by the first September. So, yeah, about
10:55:35 9 that time between Bermuda and Geneva.

10:55:38 10 Q. During your 14 years that you worked for
10:55:40 11 Mr. Brockman, did he keep a laptop at whatever
10:55:45 12 location you were to be able to access remotely?

10:55:48 13 A. Not always, but at times, yes.

10:55:51 14 Q. What is "EE"?

10:55:52 15 A. It's off the shelf software called Evidence
10:55:58 16 Eliminator.

10:55:58 17 Q. Okay.

10:56:01 18 MR. LANGSTON: Offer Exhibit 10, Your
10:56:02 19 Honor.

10:56:02 20 THE COURT: Any objection?

10:56:04 21 MR. VARNADO: No objection.

10:56:05 22 THE COURT: Without objection,
10:56:07 23 Exhibit 10 is admitted -- I'm sorry.

10:56:09 24 MR. LANGSTON: Yes, Government
10:56:10 25 Exhibit 10.

10:56:10 1 THE COURT: Government Exhibit 10 is
10:56:12 2 admitted.

10:56:13 3 MR. LANGSTON:

10:56:14 4 Q. Let's look at Government Exhibit 26. We can
10:56:28 5 actually do the whole e-mail first.

10:56:31 6 What is Government Exhibit 26?

10:56:33 7 A. It's an e-mail from Mr. Brockman to Don Jones
10:56:39 8 and me.

10:56:39 9 Q. Can you tell us why it doesn't look like a
10:56:42 10 traditional e-mail?

10:56:43 11 A. At this time, we were using fully encrypted
10:56:48 12 e-mails is the way I think it worked. And the
10:56:51 13 e-mail is received as just a series of characters --
10:56:54 14 unreadable. And one has to decrypt the e-mail.

10:56:59 15 And what my practice was, was to
10:57:00 16 decrypt the e-mail, copy it, and paste it into a
10:57:04 17 Word document and save it.

10:57:07 18 Q. Did you ever alter the e-mail from the -- after
10:57:11 19 you decrypted it to the Word document you saved it
10:57:13 20 in?

10:57:14 21 A. No.

10:57:14 22 Q. Did you ever go back after the fact and alter
10:57:16 23 an e-mail after you had saved it?

10:57:18 24 A. No.

10:57:19 25 Q. Did you have a certain naming convention for

10:57:21 1 these e-mails?

10:57:22 2 **A.** I would have a letter to indicate who the
10:57:24 3 e-mail came from, because there were a number of
10:57:27 4 people on this server. It wasn't just Mr. Brockman
10:57:29 5 and myself. Then I'd have the date in the form of
10:57:34 6 year, month, day and then a brief description of
10:57:37 7 what the e-mail was about.

10:57:40 8 **Q.** What was Mr. Brockman's number -- or letter?

10:57:43 9 **A.** "P".

10:57:50 10 **Q.** So this e-mail says -- this e-mail is attaching
10:57:54 11 an article about forensic printer technology?

10:57:58 12 **A.** Yes.

10:57:58 13 **Q.** And it says, "Therefore, any document that is
10:58:01 14 created for signature, we must ensure we never use
10:58:04 15 the original that comes out of the laser printer.
10:58:07 16 It needs to be run through a standard copy machine
10:58:09 17 first, and the copy used as an original, as the copy
10:58:12 18 machine does not have sufficient resolution to copy
10:58:15 19 the encoded dots."

10:58:17 20 Was that a -- was that a direction
10:58:22 21 given from Mr. Brockman to you?

10:58:23 22 **A.** Well, it's written more as a recommendation. I
10:58:27 23 can tell you I've never done this, so, yeah. It's
10:58:32 24 just Bob reporting -- Mr. Brockman telling Don and
10:58:36 25 myself. I don't know it was coming as a direction,

10:58:38 1 but certainly his recommendation on how to do
10:58:43 2 certain things.

10:58:43 3 Q. Okay. And then the last paragraph, "As a
10:58:46 4 reminder, we also need to remember that all copy
10:58:48 5 machines/laser printer paper has encoded into it the
10:58:52 6 manufacturer of the paper, as well as the year and
10:58:54 7 month of manufacturer. For that reason, I always
10:58:58 8 set aside some packets of copy paper with dates on
10:59:01 9 them for potential future use."

10:59:06 10 Is that -- was that a statement that
10:59:09 11 Mr. Brockman made to you on this e-mail?

10:59:10 12 A. It's -- it's in the e-mail.

10:59:12 13 Q. And was this e-mail included in the documents
10:59:15 14 obtained by the Government in September of 2018?

10:59:18 15 A. Yes.

10:59:19 16 Q. I'm going to show you what I'm going to mark as
10:59:24 17 Government Exhibit 130 -- excuse me, 131. Sorry,
10:59:42 18 I'll -- may I approach the witness?

10:59:43 19 THE COURT: You may.

10:59:57 20 MR. LANGSTON: I'll get better at this,
10:59:58 21 Your Honor, but for housekeeping I'll offer 26.

11:00:01 22 THE COURT: Okay. Any objections?

11:00:02 23 MR. VARNADO: For purposes of this
11:00:04 24 hearing, no objection.

11:00:05 25 THE COURT: Okay. Exhibit 26 is

11:00:07 1 admitted solely for purposes of this hearing.

11:00:10 2 MR. LANGSTON: To save Mr. Varnado,
11:00:13 3 that will be the case for all of the documents for
11:00:15 4 this witness.

11:00:15 5 MR. VARNADO: That's correct, Your
11:00:16 6 Honor.

11:00:19 7 MR. LANGSTON:

11:00:19 8 Q. What is Government Exhibit 131? Do you
11:00:23 9 recognize this?

11:00:24 10 A. It's an e-mail from Mr. Brockman to Don Jones
11:00:26 11 and myself.

11:00:27 12 Q. Okay. Is this the same -- the same type of
11:00:31 13 thing where you copied it into a Word document and
11:00:33 14 then saved it?

11:00:34 15 A. I -- I believe so. I can't tell from this
11:00:37 16 document, but I believe so.

11:00:38 17 Q. Okay. Mr. Brockman uses the phrase, "The
11:00:46 18 house" in this e-mail. What does that mean to you?

11:00:48 19 A. I understand that to mean the IRS.

11:00:50 20 Q. And does he -- what are the circumstances about
11:00:57 21 this? What is he reporting to you here?

11:01:02 22 A. He's reporting on a visit to the offices of
11:01:08 23 Miller & Chevalier, a Washington law firm.

11:01:12 24 Q. The second name is C-H-E-V-A-L-I-E-R. He went
11:01:20 25 to that law firm to look through their files?

11:01:23 1 A. I -- yeah, that's what I -- I can only repeat
11:01:26 2 in the e-mail he sent. But, yes, I assume so.

11:01:28 3 Q. He wrote to you, "I'm going to go through these
11:01:31 4 a page at a time, because I wanted to shred
11:01:34 5 personally anything that was super sensitive before
11:01:36 6 turning them over to the outside document shredding
11:01:42 7 and destruction service."

11:01:43 8 A. That's what he says.

11:01:44 9 Q. And does he also express concerns to you about
11:01:46 10 the amount of information that is being saved in
11:01:48 11 these attorney files?

11:01:54 12 A. Not sure where that is, but I'll assume it's
11:01:56 13 there.

11:01:56 14 Q. "What I want to report to you both is that the
11:01:58 15 volume detail and organization of these files was
11:02:02 16 dumbfounding."

11:02:05 17 A. Just going to read that part.

11:02:18 18 A. Yes.

11:02:18 19 Q. Direct your attention to the bottom. Is he
11:02:20 20 also telling you to be circumspect about the
11:02:23 21 information you give to attorneys?

11:02:25 22 A. Yes.

11:02:25 23 Q. And he's writing to you, "Be very circumspect
11:02:29 24 as to what we tell them verbally, as it will all be
11:02:33 25 reduced to writing and kept in the file"?

11:02:36 1 **A.** Yes.

11:02:36 2 **Q.** Was this one of the documents included on the
11:02:39 3 server that was obtained by the government in
11:02:41 4 September of 2018?

11:02:42 5 **A.** Yes.

11:02:43 6 MR. LANGSTON: Offer 131.

11:02:45 7 THE COURT: Same objection? -- same.

11:02:47 8 MR. VARNADO: Same response, Your
11:02:49 9 Honor.

11:02:49 10 THE COURT: Just for the record, all of
11:02:51 11 the exhibits that are being offered with this
11:02:53 12 witness are admitted for purposes of this hearing
11:02:56 13 only, except where you step in and say that you have
11:02:59 14 another objection.

11:03:00 15 MR. VARNADO: Correct, Your Honor. And
11:03:02 16 -- and that really is what the stipulation said at
11:03:04 17 the outset. Frankly, all of the documents are only
11:03:07 18 being entered into evidence for purposes of this
11:03:09 19 hearing, but I wanted to make that clear,
11:03:13 20 particularly with the ones undated with no
11:03:15 21 identifying characteristics.

11:03:17 22 THE COURT: Definitely.

11:03:20 23 MR. LANGSTON:

11:03:20 24 **Q.** Let's look at Government Exhibit 9. Is
11:03:40 25 Government Exhibit 91 of the performance reviews

11:03:42 1 prepared by Mr. Brockman?

11:03:43 2 **A.** Yes.

11:03:44 3 **Q.** Okay. And he would prepare these for you
11:03:46 4 approximately once per year?

11:03:48 5 **A.** Approximately, yes.

11:03:48 6 **Q.** Okay. And he gives you sort of general goals.
11:03:54 7 Is there a section on general goals?

11:03:57 8 **A.** Yes.

11:03:57 9 **Q.** And these are sort of standing instructions to
11:04:01 10 you?

11:04:02 11 **A.** They are.

11:04:02 12 **Q.** Okay. Let's look at those goals. We'll start
11:04:06 13 at Paragraph 2, second page. Okay. "Continue to
11:04:20 14 keep the document image database up to date
11:04:23 15 constantly."

11:04:24 16 Was that again the large file we had
11:04:28 17 been talking about?

11:04:28 18 **A.** Yes.

11:04:28 19 **Q.** He was aware you were keeping that file?

11:04:33 20 **A.** Yes.

11:04:33 21 **Q.** Let's look at paragraphs 13 and 15.

11:04:38 22 **A.** Yes.

11:04:38 23 **Q.** Okay. And did Mr. Brockman tell you to,
11:04:42 24 "Convert keeping all e-mail and financial reports on
11:04:45 25 an encrypted USB dongle. Carry it in a different

11:04:49 1 location in luggage when traveling abroad"?

11:04:54 2 **A.** Yes.

11:04:54 3 **Q.** Did that reflect a concern of Mr. Brockman's of
11:04:56 4 those files being seized by Customs?

11:04:59 5 **A.** It's one of his concerns, yes.

11:05:00 6 **Q.** Number 15 says, "Operate as much as possible in
11:05:04 7 a paperless manner, such that if someone were to
11:05:08 8 come to your door unannounced, everything would be
11:05:10 9 encrypted in digital form"?

11:05:12 10 **A.** Yes.

11:05:12 11 **Q.** Did that reflect a concern he had about a
11:05:15 12 potential search of your house?

11:05:16 13 **A.** I believe so.

11:05:18 14 **Q.** Let's look at paragraphs 17 and 19. Number 17,
11:05:26 15 "Run Evidence Eliminator at least weekly on your
11:05:30 16 computer."

11:05:32 17 Is that -- what was the purpose of
11:05:34 18 running Evidence Eliminator weekly?

11:05:36 19 **A.** Just -- I understood it to be just computer
11:05:39 20 practice. Evidence Eliminator is a standard form of
11:05:45 21 software, but to make sure there are was nothing
11:05:47 22 lingering on the computers that shouldn't be there.

11:05:49 23 **Q.** When you say good computer practice, do you
11:05:51 24 mean good security practice, or is this like a --
11:05:54 25 making the computer run more efficiently?

11:05:56 1 **A.** Good security practice, and I guess more
11:05:58 2 efficiently. Bit of both.

11:05:59 3 **Q.** Okay. And number 19, "Get Don's computer
11:06:03 4 environment operating on Radmin."

11:06:06 5 Who is Don?

11:06:07 6 **A.** Don is Don Jones.

11:06:08 7 **Q.** What was Mr. Jones's role, prior to you coming
11:06:12 8 on board?

11:06:13 9 **A.** He was my predecessor, and he looked after
11:06:16 10 communications with various service providers, and
11:06:19 11 directors, and so on.

11:06:22 12 **Q.** Okay. And he helped administer the trust,
11:06:24 13 prior to you -- or gave direction to the trust prior
11:06:26 14 to you coming on board?

11:06:27 15 **A.** He helped administer the trust, prior to me
11:06:31 16 coming on board.

11:06:31 17 **Q.** This is a 2010 performance review. Did
11:06:35 18 Mr. Jones have a home in Mississippi in 2010?

11:06:41 19 **A.** I don't know.

11:06:42 20 **Q.** Okay. Again, this is -- "Get Don's computer
11:06:48 21 environment operating Radmin."

11:06:51 22 That's that remote access software?

11:06:53 23 **A.** It is, yes.

11:06:54 24 **Q.** Did Mr. Jones -- at some point did Mr. Jones
11:06:57 25 move to the United States?

11:06:57 1 **A.** He did.

11:06:58 2 **Q.** And did he have a computer that he would --
11:07:00 3 that was located in Bermuda that he would access
11:07:02 4 remotely?

11:07:03 5 **A.** Yes.

11:07:09 6 **Q.** Are you familiar with the term "open
11:07:10 7 correspondence"?

11:07:10 8 **A.** Yes.

11:07:11 9 **Q.** And --

11:07:14 10 **MR. LANGSTON:** We'll offer Exhibit 9,
11:07:15 11 Your Honor.

11:07:16 12 **MR. VARNADO:** Same response, Your
11:07:17 13 Honor.

11:07:17 14 **THE COURT:** Government Exhibit 9 is
11:07:20 15 admitted.

11:07:20 16 **MR. LANGSTON:**

11:07:20 17 **Q.** What does the phrase "open correspondence" mean
11:07:24 18 to you?

11:07:24 19 **A.** Open communications weren't subject to
11:07:26 20 encryption -- in my context, not subject to
11:07:29 21 encryption.

11:07:29 22 **Q.** Okay. And so, you and Mr. Brockman had an
11:07:32 23 encrypted e-mail server and encrypted e-mail
11:07:36 24 addresses you would communicate with?

11:07:37 25 **A.** Yes.

11:07:37 1 Q. And then, you also had a non-encrypted e-mail
11:07:40 2 address, and Mr. Brockman had his Reynolds and
11:07:44 3 Reynolds e-mail?

11:07:45 4 A. Yes, but we rarely used that. Even for
11:07:48 5 innocuous things, we tended to use the e-mail server
11:07:52 6 as a main form of communication.

11:07:53 7 Q. Okay. You would also send each other letters?

11:07:55 8 A. Yes, occasionally.

11:07:56 9 Q. And part of the reason you would do this would
11:07:59 10 be to create a record of that conversation?

11:08:02 11 A. From time to time, yes.

11:08:04 12 Q. Okay. Let's look at Exhibit 19. What is
11:08:13 13 Exhibit 19?

11:08:14 14 A. It's an e-mail from Mr. Brockman to me, sent on
11:08:19 15 the 12th of June, 2011.

11:08:20 16 Q. And actually, if we could focus on the top half
11:08:24 17 of the e-mail. What is Mr. Brockman asking you to
11:08:29 18 do?

11:08:34 19 A. He's asking me to send him a letter as the --
11:08:37 20 as the trustee to asking to investigate the
11:08:42 21 potential for a -- for selling -- management buyout
11:08:47 22 of Reynolds and Reynolds.

11:08:48 23 Q. Okay. So he was interested in potential
11:08:54 24 management buyout of Reynolds and Reynolds?

11:08:55 25 A. Well, he is the CEO. It was clearly something

11:08:59 1 he thought might work.

11:09:00 2 Q. Okay. And he's asking you to send him a letter
11:09:02 3 as trustee, asking him to investigate this
11:09:05 4 possibility?

11:09:06 5 A. Yes.

11:09:07 6 Q. And he actually even sort of dictates the text?

11:09:12 7 A. He gave me some wording, yes.

11:09:14 8 Q. Okay. And the first line is, "Dear Bob,
11:09:18 9 congrats on passing your 70th birthday. I trust
11:09:23 10 that proper celebrations occurred"?

11:09:25 11 A. Yes.

11:09:26 12 Q. If we can go to Exhibit 20. Exhibit 20 is the
11:09:39 13 actual letter that you produced?

11:09:43 14 A. Yes, I produced my own version of it, yes.

11:09:46 15 Q. Okay. If we can look at the first paragraph.
11:09:50 16 "Dear Bob, I would like to extend my personal
11:09:54 17 congratulations on passing your 70th birthday. I
11:09:57 18 trust that proper celebrations occurred. I'm sorry
11:10:01 19 I was not there to toast you."

11:10:03 20 A. Yes.

11:10:03 21 Q. You sort of took the first line he suggested?

11:10:05 22 A. I followed the letter to a large extent, yes.

11:10:08 23 Q. Actually throughout you follow his draft?

11:10:10 24 A. Yes.

11:10:11 25 Q. And you don't send this to him on the encrypted

11:10:14 1 e-mail server?

11:10:15 2 **A.** No, I don't.

11:10:16 3 **Q.** That's again because you want a record that
11:10:18 4 this letter was sent?

11:10:19 5 **A.** Yes.

11:10:21 6 **Q.** At this point in 2011, was Mr. Brockman giving
11:10:27 7 you direction as to how to run the trust?

11:10:29 8 **A.** He was giving directions in relation to the
11:10:31 9 trust, yes.

11:10:31 10 **Q.** Okay. And this letter appears to be you making
11:10:36 11 a request to him?

11:10:37 12 **A.** Yes.

11:10:38 13 **Q.** Okay.

11:10:40 14 MR. LANGSTON: Offer 19 and 20.

11:10:42 15 THE COURT: Okay.

11:10:42 16 MR. VARNADO: No objection, Your Honor.

11:10:44 17 THE COURT: Okay. Subject to the same
11:10:46 18 stipulations, 19 and 20 are admitted.

11:10:48 19 MR. LANGSTON:

11:10:48 20 **Q.** I'll show you Exhibit 24. We'll start at the
11:11:00 21 bottom. Okay. "Tangarra Consultants Limited,
11:11:09 22 etamine@tangarra.com."

11:11:09 23 Is that the public e-mail address for
11:11:14 24 you that we discussed?

11:11:14 25 **A.** That's one of my public addresses, yes.

11:11:16 1 Q. Okay. And you sent it to Pilot Management.

11:11:18 2 Who is that?

11:11:19 3 A. That's the company that employed Don Jones.

11:11:21 4 Q. What are you purportedly telling Mr. Jones
11:11:25 5 here?

11:11:25 6 A. I'm telling Mr. Jones of the potential for a
11:11:28 7 sale of the Reynolds and Reynolds company, and in
11:11:31 8 the e-mail I send him, I'm inviting him to undertake
11:11:37 9 some evaluation, industry analysis work.

11:11:39 10 Q. Okay. And was that the true reason you were
11:11:42 11 sending him this e-mail?

11:11:44 12 A. In part. In fact, he was retained to do that,
11:11:48 13 but the real reason to send the e-mail was Don Jones
11:11:53 14 had a connection with some of his own unrelated
11:11:57 15 entities. It was just finding a way of winding up
11:12:00 16 his offshore connections, and getting some funds
11:12:05 17 over to him in the US.

11:12:06 18 Q. Okay. If I understand what you are saying,
11:12:07 19 Mr. Jones has money or assets in offshore entities?

11:12:12 20 A. Entities that he had an association with, yes.

11:12:14 21 Q. Okay. And the goal is to get that money to him
11:12:18 22 in the United States?

11:12:18 23 A. Yes.

11:12:19 24 Q. And so, you are purporting to hire him to do
11:12:25 25 consulting for Reynolds and Reynolds, and you can

11:12:27 1 pay him then money in the United States?

11:12:29 2 MR. VARNADO: Objection. Leading.

11:12:31 3 THE COURT: Okay. Objection's
11:12:33 4 sustained.

11:12:33 5 MR. LANGSTON: Okay.

11:12:37 6 Q. What's the -- okay. What's the -- what was the
11:12:40 7 purpose of this?

11:12:40 8 A. Well, the -- Mr. Jones was retained to do this
11:12:43 9 work, but the -- but a big part of this was to limit
11:12:48 10 open correspondence -- that was to also get him some
11:12:52 11 of his -- his money back offshore -- offshore to him
11:12:57 12 in the US.

11:12:58 13 Q. Okay. If we can go up to the next e-mail.

11:13:01 14 A. Sorry. I should also add there was no other
11:13:04 15 way to communicate with Mr. Jones at this time,
11:13:07 16 because he wasn't on the encrypted e-mail server at
11:13:10 17 this time.

11:13:10 18 Q. Okay. You forward the e-mail you sent to
11:13:12 19 Mr. Jones to Bob Brockman?

11:13:14 20 A. Yes.

11:13:14 21 Q. And you forward that to him on the encrypted
11:13:17 22 e-mail server?

11:13:18 23 A. Yes.

11:13:18 24 Q. And you say, "Bob, please see the e-mail I sent
11:13:21 25 to Don. This was an open e-mail. I will speak to

11:13:26 1 Don on silent phone and ask him to send a response
11:13:29 2 asking for a little more money."

11:13:32 3 **A.** Yes.

11:13:32 4 **Q.** So you did have another way of communicating
11:13:34 5 with Mr. Jones?

11:13:35 6 **A.** Telephone device.

11:13:36 7 **Q.** Okay. What is silent phone?

11:13:38 8 **A.** Oh, it's sort of like a signal-type WhatsApp
11:13:43 9 encrypted -- I don't know how you describe it.

11:13:47 10 **Q.** Sort of an encrypted, voice messaging service?

11:13:51 11 **A.** Encrypted telephone service.

11:13:53 12 **Q.** Okay. Why are you going to tell him on the
11:13:57 13 phone that you want him to send a request asking for
11:13:59 14 more money?

11:14:00 15 **A.** Probably to give some substance of the
11:14:02 16 negotiations.

11:14:02 17 **Q.** Is there actually a negotiation taking place?

11:14:05 18 **A.** Um, not in terms of the money. But in terms of
11:14:12 19 retaining Don, he was actually retained.

11:14:14 20 **Q.** But so, you telling him to ask for more money,
11:14:16 21 is that actually a real negotiation?

11:14:18 22 **A.** Not that part, no.

11:14:19 23 **Q.** And you are asking him to create an e-mail
11:14:22 24 asking for more money?

11:14:23 25 **A.** Yes.

11:14:24 1 Q. What is Mr. Brockman responding with?

11:14:29 2 A. He says, "I recommend that you proceed on this
11:14:32 3 basis."

11:14:35 4 Q. And was this one of the documents contained in
11:14:37 5 the encrypted -- or in the hard drive handed over to
11:14:41 6 the Government?

11:14:42 7 A. Yes, it was.

11:14:44 8 MR. LANGSTON: We'll offer 24.

11:14:45 9 MR. VARNADO: No objection, Your Honor.

11:14:46 10 THE COURT: Subject to the
11:14:48 11 stipulations, the exhibit is admitted.

11:14:51 12 MR. LANGSTON:

11:14:51 13 Q. I'll show you Exhibit 23. What is Falcata?

11:15:02 14 A. Falcata was a private equity fund that was
11:15:05 15 established in 2015/'16 -- sorry '16/'17 -- actually
11:15:13 16 later to invest in enterprise software companies.

11:15:17 17 Q. Okay. Was Mr. Brockman one of the general
11:15:21 18 partners or an entity that he controlled one of the
11:15:23 19 general partners?

11:15:24 20 A. Yes.

11:15:24 21 Q. Who was the limited partner?

11:15:26 22 A. Point Investments.

11:15:28 23 Q. What was the size of the investment that Point
11:15:31 24 ended up making?

11:15:32 25 A. Oh, I can't recall right now.

11:15:34 1 Q. Was it a billion dollars?

11:15:35 2 A. I can't recall, but could well be.

11:15:39 3 Q. And so, at this point who is the director of
11:15:42 4 Point?

11:15:43 5 A. At this point, it was me and I think perhaps
11:15:48 6 James Gilbert.

11:15:49 7 Q. Okay. And so, you were representing the
11:15:51 8 limited partner and Mr. Brockman was representing
11:15:54 9 the general partner?

11:15:55 10 A. Yes.

11:15:55 11 Q. Okay.

11:15:58 12 A. One of the general partners. There were other
11:16:01 13 general partners.

11:16:02 14 Q. Okay. And you say -- you say -- this is --
11:16:05 15 another encrypted e-mail?

11:16:06 16 A. Yes.

11:16:07 17 Q. And as of this hannah.com server, who were the
11:16:12 18 -- who were the people that had access to this
11:16:15 19 server?

11:16:16 20 A. Myself and Mr. Brockman.

11:16:19 21 Q. And you say to him, "Bob, could you please let
11:16:23 22 me know which of the points in the executive summary
11:16:26 23 I can contest with you?

11:16:32 24 "I will be pushing for a straight
11:16:34 25 1.5 percent on management fees, reducing if

11:16:37 1 committed funds remain uncalled after a certain
11:16:40 2 time. I will make noise about co-invests and be
11:16:44 3 opposed, but then fall back to LP consent is
11:16:48 4 required. Is there anything else I can contest?"

11:16:57 5 What are you asking Mr. Brockman?

11:16:59 6 **A.** His views on what's going on, and also in terms
11:17:03 7 of the negotiation where we're going to end up. I'm
11:17:05 8 basically wanting to agree with him on the back
11:17:08 9 channels what's going on while on the other side I'm
11:17:13 10 negotiating with -- through the lawyers with, I
11:17:15 11 think, some of the other representatives of the
11:17:17 12 other GP's.

11:17:18 13 **Q.** Okay. Prior to the negotiation that's going to
11:17:20 14 take place, sort of in public, you are planning the
11:17:23 15 negotiation in the back channels with Mr. Brockman?

11:17:25 16 **A.** Yes.

11:17:25 17 **Q.** And if we can go to the top of this e-mail. Is
11:17:41 18 this Mr. Brockman's response to you?

11:17:42 19 **A.** Yes.

11:17:43 20 **Q.** And when he says, "I would continue to gripe
11:17:46 21 about co-invests, but then give in," is that an
11:17:50 22 instruction he's given to you about how to handle
11:17:52 23 the public negotiation?

11:17:53 24 **A.** Yes.

11:17:58 25 **MR. LANGSTON:** I'll offer 23.

11:18:00 1 MR. VARNADO: No objection.

11:18:01 2 THE COURT: Subject to stipulations,
11:18:04 3 Government Exhibit 23 is admitted.

11:18:05 4 MR. LANGSTON:

11:18:05 5 Q. I'm going to show you Exhibit 21. Is this
11:18:16 6 another e-mail from Mr. Brockman to you on the
11:18:19 7 encrypted messaging service?

11:18:21 8 A. It is.

11:18:23 9 Q. And it says, "Evatt, I think it would be a good
11:18:25 10 idea for you to send an open e-mail to Stuart that
11:18:29 11 you've been considering the formation of a medical
11:18:32 12 research foundation, somewhat along these lines."

11:18:35 13 Who is Stuart?

11:18:37 14 A. It's Stuart Yudofsky.

11:18:39 15 Q. Okay. Mr. Brockman is telling you to send an
11:18:42 16 open e-mail to him?

11:18:43 17 A. Yes.

11:18:44 18 Q. And I'll show you Exhibit 27.

11:18:51 19 A. Yes.

11:18:51 20 Q. And is this the e-mail that you sent to
11:18:55 21 Dr. Yudofsky?

11:18:56 22 A. I believe it is. There is a lag of 12 days
11:18:59 23 between the two, which I don't understand, but I
11:19:02 24 believe it is.

11:19:02 25 Q. Okay. And this is from your, again, public

11:19:05 1 e-mail address?

11:19:06 2 **A.** Yes.

11:19:07 3 **Q.** Okay.

11:19:08 4 MR. LANGSTON: I'll offer 21 and 27.

11:19:10 5 MR. VARNADO: No objection.

11:19:11 6 THE COURT: 21 and 27 are admitted,
11:19:14 7 subject to the stipulation.

11:19:16 8 MR. LANGSTON:

11:19:17 9 **Q.** Let's talk a little bit more about

11:19:19 10 Dr. Yudofsky. During your time working for

11:19:21 11 Mr. Brockman, did he direct you to donate money from
11:19:25 12 the trust to Baylor University?

11:19:27 13 **A.** Yes.

11:19:28 14 **Q.** And what was the amount of that?

11:19:29 15 **A.** Been a little confused about the amount, but I
11:19:34 16 think I've confirmed recently it's \$25 million.

11:19:37 17 **Q.** Okay. I'll show you -- would it refresh your
11:19:40 18 recollection to look at Exhibit 14?

11:19:41 19 **A.** Can I have a quick look, yes? Yes.

11:19:47 20 **Q.** Is your recollection refreshed?

11:19:50 21 **A.** Yes.

11:19:51 22 **Q.** Was it \$25 million?

11:19:53 23 **A.** Yes.

11:19:55 24 **Q.** Okay. Let's actually put 14 up on the screen.

11:20:06 25 Is this a conversation between you and Mr. Brockman

11:20:10 1 on the encrypted e-mail server about this gift?

11:20:13 2 **A.** Yes.

11:20:13 3 **Q.** Okay. Did Mr. Brockman direct you to make any
11:20:18 4 conditions on this gift?

11:20:19 5 **A.** Yes.

11:20:20 6 **Q.** What were the conditions?

11:20:21 7 **A.** The donor is to remain anonymous. Secondly, if
11:20:26 8 Stuart died or became incapable of performance, his
11:20:29 9 place and direct use of the donations is to be taken
11:20:33 10 by Beth Yudofsky.

11:20:34 11 **Q.** Are you familiar with the position, principal
11:20:38 12 investigator?

11:20:38 13 **A.** Very rough idea of it.

11:20:41 14 **Q.** Was one of Mr. Brockman's conditions that
11:20:43 15 Dr. Yudofsky be the principle investigator for this
11:20:45 16 \$25 million --

11:20:46 17 **A.** I'm not sure. I don't think so. It's not my
11:20:48 18 understanding of principal investigator. I thought
11:20:51 19 principal investigator was someone -- I could be
11:20:53 20 wrong -- in relation to a specific research project,
11:20:59 21 but I could be wrong about that.

11:21:00 22 **Q.** Setting aside the name, was it one of
11:21:02 23 Mr. Brockman's conditions that Dr. Yudofsky be in
11:21:05 24 charge of the spending of this gift at Baylor?

11:21:09 25 **A.** Be -- yes, I guess so. Directing the use of

11:21:13 1 the donation, yes.

11:21:14 2 Q. Okay. Let's look down at your e-mail. "Bob, I
11:21:19 3 have received the proposal from Stuart Yudofsky. I
11:21:22 4 will draft a response along the lines of your
11:21:25 5 previous letters; however, with greatly varied
11:21:29 6 wording so it cannot be suggested that I have taken
11:21:32 7 any lead or direction from you."

11:21:34 8 At this point -- with respect to this
11:21:41 9 gift, were you taking lead or direction from
11:21:43 10 Mr. Brockman?

11:21:43 11 A. Mr. Brockman was giving me direction in
11:21:46 12 relation to this donation to Baylor.

11:21:50 13 Q. Okay. Do you actually send a draft of your
11:21:52 14 letter to Baylor to Mr. Brockman for his review?

11:21:55 15 A. Um, I believe I did.

11:21:57 16 Q. I'll show you Exhibit 15. And is Exhibit 15
11:22:05 17 you sending a draft of your letter to Baylor to
11:22:08 18 Mr. Brockman for review?

11:22:09 19 A. Yes.

11:22:09 20 Q. And he makes some grammatical changes and then
11:22:14 21 sends it to you?

11:22:14 22 A. Yes.

11:22:17 23 Q. And then, what is -- then if you'll turn your
11:22:20 24 attention to Exhibit 16 -- actually, I'm sorry.

11:22:25 25 Pull up the bottom again on 15. And you say,

11:22:32 1 "Attached is a draft letter to Stuart Yudofsky and
11:22:35 2 Baylor. I have followed the outline of your letter;
11:22:38 3 however, have made some changes so it cannot be said
11:22:41 4 that I just copied your letter."

11:22:45 5 And then you sent it to him for
11:22:46 6 review?

11:22:47 7 **A.** Yes.

11:22:47 8 **Q.** Okay. And Exhibit 16, is that sort of the
11:22:52 9 final executed document that you sent to Baylor?

11:22:55 10 **A.** It is.

11:23:00 11 MR. LANGSTON: Offer 14, 15 and 16.

11:23:03 12 MR. VARNADO: No objection.

11:23:04 13 THE COURT: Subject to the
11:23:05 14 stipulations, 14, 15 and 16 are admitted.

11:23:08 15 MR. LANGSTON:

11:23:08 16 **Q.** Did Mr. Brockman ever use the term with you
11:23:12 17 "Open the robe"?

11:23:13 18 **A.** He did.

11:23:14 19 **Q.** What was your understanding of what that term
11:23:16 20 meant?

11:23:16 21 **A.** It was -- it was my understanding -- and
11:23:19 22 depending on the context was that Mr. Brockman would
11:23:23 23 explain to somebody the full background formally on
11:23:26 24 how the trust works.

11:23:27 25 **Q.** And when you say formally about how the trust

11:23:30 1 works, that he was the one giving direction to you?

11:23:33 2 **A.** That he would give directions in relation to
11:23:35 3 what the trust was doing from time to time, yes.

11:23:38 4 **Q.** Okay. Did Mr. Brockman ever tell you he opened
11:23:41 5 the robe to Dr. Stuart Yudofsky?

11:23:44 6 **A.** Yes.

11:23:44 7 **Q.** I'd like to shift gears and talk about when
11:23:48 8 Mr. Brockman learned of a potential investigation.
11:23:52 9 Are you familiar with Vista Equity Holdings -- or --
11:23:58 10 excuse me, Vista Equity Partners?

11:24:00 11 **A.** Yes.

11:24:02 12 **Q.** As part -- what was Mr. Brockman's relationship
11:24:05 13 to Vista Equity Partners?

11:24:09 14 **A.** I think there's a long history of a
11:24:11 15 relationship --

11:24:13 16 **Q.** Maybe I'll shorten it a little bit. Was Point
11:24:16 17 Investments the sole investor in the first Vista
11:24:21 18 fund?

11:24:22 19 **A.** It wasn't the sole investor. There was another
11:24:28 20 investor, but Point investors was the biggest
11:24:32 21 investor, I believe.

11:24:33 22 **Q.** As part of the formation of Vista, was there an
11:24:36 23 offshore general partner -- strike that. As part of
11:24:41 24 the creation of the first Vista fund, was there an
11:24:44 25 offshore, general partner interest associated with

11:24:48 1 Robert Smith?

11:24:49 2 **A.** I believe so.

11:24:51 3 **Q.** And are you aware of what lawyer Mr. Smith used
11:24:54 4 to establish his related offshore trust?

11:24:59 5 **A.** I believe it was Carlos Kepke.

11:25:03 6 **Q.** What is Mr. Kepke's relationship to The
11:25:07 7 Brockman Trust?

11:25:07 8 **A.** I can't be sure, but I believe Mr. Kepke is the
11:25:11 9 one who drafted the original Brockman Trust deed.

11:25:14 10 **Q.** At some point, did you and Mr. Brockman learn
11:25:17 11 that Mr. Smith was separated and getting a divorce
11:25:21 12 from his first wife?

11:25:22 13 **A.** Yes.

11:25:23 14 **Q.** Did Mr. Brockman have any professional concerns
11:25:26 15 related to Mr. Smith's divorce?

11:25:30 16 **A.** Mr. Brockman had concerns about any time a
11:25:34 17 person got divorced, and it would impact business
11:25:36 18 operations. Vista was a part owner of Reynolds and
11:25:40 19 Reynolds.

11:25:40 20 **Q.** Specifically, did he have a concern -- not
11:25:43 21 about the matrimonial proceedings, but that
11:25:46 22 Mr. Smith's divorce could affect the regulatory tax
11:25:50 23 position of -- the regulatory tax --

11:25:56 24 MR. VARNADO: Objection to leading.

11:25:58 25 THE COURT: Objection sustained. Break

11:26:00 1 it down and ask the question.

11:26:01 2 MR. LANGSTON: Okay.

11:26:02 3 Q. Was there a concern about the tax position of
11:26:07 4 The Brockman Trust being affected by the divorce?

11:26:08 5 A. I -- I don't recall. I could be wrong, but I
11:26:13 6 don't recall that being a concern.

11:26:14 7 Q. Okay. If you saw your grand jury testimony,
11:26:16 8 would that refresh your recollection?

11:26:19 9 A. Yes.

11:26:20 10 Q. Okay. I'd like to show you what I'll mark for
11:26:23 11 identification as 132, which is the February 7,
11:26:31 12 2019, grand jury.

11:27:00 13 May I approach?

11:27:01 14 THE COURT: You may approach.

11:27:08 15 MR. LANGSTON:

11:27:08 16 Q. Like you to turn to Page 52 -- sorry. Excuse
11:27:11 17 me. 62.

11:27:14 18 A. Yes.

11:27:15 19 Q. Does that refresh your recollection -- why
11:27:18 20 don't you read that page to yourself.

11:27:20 21 A. Yes, thank you. Okay.

11:27:40 22 Q. Does that refresh your recollection as to
11:27:43 23 whether there was a concern that the Smith divorce
11:27:46 24 could affect The Brockman Trust from a tax
11:27:49 25 perspective?

11:27:50 1 **A.** Yes.

11:27:51 2 **Q.** And -- and did it? Sorry, the question was did
11:27:55 3 that refresh your recollection?

11:27:56 4 **A.** Yes, it did.

11:27:56 5 **Q.** And was there a concern about the tax
11:27:59 6 perspective?

11:28:00 7 **A.** It was one of the concerns, yes.

11:28:10 8 **MR. LANGSTON:** For the record, I've
11:28:12 9 taken the document back from the witness.

11:28:14 10 **THE COURT:** Okay.

11:28:19 11 **MR. LANGSTON:**

11:28:19 12 **Q.** As part of this concern, did Mr. Brockman ever
11:28:21 13 direct you to view Mr. Kepke's files regarding his
11:28:25 14 relationship with Mr. Smith?

11:28:27 15 **A.** Yes.

11:28:28 16 **Q.** And so, just to be clear, you are viewing
11:28:31 17 Mr. Smith's files with Mr. Kepke?

11:28:33 18 **A.** Yes.

11:28:34 19 **Q.** You are doing that on behalf of Mr. Brockman?

11:28:36 20 **A.** I'm -- yes, at his direction.

11:28:38 21 **Q.** Okay. And I'll show you Exhibit 11. And this
11:28:57 22 is an e-mail in 2000 -- November of 2013, from
11:29:02 23 Mr. Brockman to you?

11:29:03 24 **A.** Yes.

11:29:03 25 **Q.** Okay. It says, "Robert just sent me what was

11:29:08 1 supposed to be the deposition transcript."

11:29:11 2 Are you aware of which -- was that --
11:29:14 3 what was -- what proceeding was that deposition
11:29:18 4 taken in?

11:29:18 5 **A.** I believe it was in the matrimonial proceedings
11:29:24 6 -- Robert's matrimonial proceedings.

11:29:26 7 **Q.** Was it fair to say that in 2013, those divorce
11:29:29 8 proceedings were taking place?

11:29:31 9 **A.** To the best of my recollection.

11:29:33 10 **Q.** And that you and Mr. Brockman were reviewing
11:29:36 11 documents related to that proceeding?

11:29:38 12 **A.** Well, the deposition.

11:29:41 13 **Q.** Okay. And was this connected to a concern over
11:29:47 14 this potential spillover into the tax position?

11:29:51 15 **A.** Well, into the regulatory world. The -- the
11:29:54 16 attention -- yeah, from regulators, yes.

11:29:57 17 **Q.** Okay. When you say "regulators," you mean
11:29:59 18 governments?

11:29:59 19 **A.** Governments, yes.

11:30:01 20 **Q.** Did you meet with Mr. Smith's attorneys in
11:30:05 21 connection to this?

11:30:06 22 **A.** I did.

11:30:08 23 **Q.** And in the fall of 2014, were you -- were you
11:30:12 24 communicating with attorneys from Skadden Arps on
11:30:16 25 behalf of Mr. Smith?

11:30:17 1 **A.** I'm not great on the dates, but, yes, at some
11:30:19 2 point I did meet with lawyers from from Skadden
11:30:23 3 Arps.

11:30:23 4 **Q.** Did Mr. Brockman tell you he was meeting with
11:30:25 5 those attorneys?

11:30:26 6 **A.** He -- I believe he did.

11:30:28 7 **Q.** At some point in 2016, did you believe the
11:30:32 8 inquiry into Mr. Smith had become a criminal
11:30:35 9 investigation?

11:30:36 10 **A.** At some point, I believe it was -- yes, from
11:30:40 11 IRS investigation to the Department of Justice
11:30:42 12 investigation.

11:30:43 13 **Q.** Were you concerned that could expose the trust
11:30:46 14 to further investigation?

11:30:48 15 **A.** It didn't particularly concern me, but it -- it
11:30:51 16 -- the potential was there for it to -- yeah, leech
11:30:57 17 over into the trust.

11:30:58 18 **Q.** Did it concern Mr. Brockman?

11:31:00 19 **A.** I believe it was a concern he had as well, in
11:31:03 20 that sense of leeching over into the trust.

11:31:05 21 **Q.** Okay. I think we said that your predecessor
11:31:10 22 for Mr. Brockman was Don Jones?

11:31:12 23 **A.** Yes.

11:31:12 24 **Q.** And after he retired, where did Mr. Jones live?

11:31:17 25 **A.** His retirement kind of came gradually. He was

11:31:21 1 in North Port in Florida for awhile, and then
11:31:26 2 Oxford, Mississippi.

11:31:27 3 Q. And --

11:31:29 4 MR. LANGSTON: Your Honor, if I can
11:31:31 5 offer 11.

11:31:32 6 THE COURT: Okay.

11:31:33 7 MR. VARNADO: No objection.

11:31:33 8 THE COURT: Subject to the stipulation,
11:31:35 9 Government's Exhibit 11 is admitted.

11:31:43 10 MR. LANGSTON:

11:31:44 11 Q. Did Mr. Brockman ever express concern to you
11:31:46 12 about Mr. Jones keeping documents related to the
11:31:48 13 trust in the United States?

11:31:49 14 A. Over a number of years, both Mr. Brockman and I
11:31:52 15 were concerned about whether or not Don had taken
11:31:55 16 anything to the US from Bermuda.

11:31:58 17 Q. Okay. Did Mr. Jones pass away in June of 2016?

11:32:01 18 A. Yes.

11:32:01 19 Q. Did you and Mr. Brockman attend his funeral?

11:32:04 20 A. Yes.

11:32:05 21 Q. Did you learn anything from Mr. Jones's widow
11:32:09 22 at the funeral?

11:32:10 23 A. Yes, she told me there were a large number of
11:32:13 24 documents and drives that were still -- appeared to
11:32:15 25 be work related.

11:32:16 1 Q. Did you relay that information to Mr. Brockman?

11:32:19 2 A. I did.

11:32:20 3 Q. And what did he tell you to do?

11:32:24 4 A. He told me I needed to come and collect all of

11:32:26 5 that material.

11:32:26 6 Q. When you say collect --

11:32:29 7 A. Shred -- take. Take all of that material.

11:32:34 8 Q. All right. I'll show you Exhibit 12.

11:32:39 9 A. Yes.

11:32:41 10 Q. What is Exhibit 12?

11:32:42 11 A. It's my 2016 performance evaluation from me to

11:32:47 12 Mr. Brockman.

11:32:48 13 Q. Okay. So you are writing this in 2017, but

11:32:52 14 referring to your 2016 performance?

11:32:54 15 A. Yes.

11:32:55 16 Q. Okay. Let's look -- and you write to him, "I

11:33:01 17 would, say without hesitation, 2016 has been my best

11:33:05 18 year. I established, beyond any doubt, that I can

11:33:09 19 work under pressure with the added threat of

11:33:12 20 detention hanging over me, all for the sake of

11:33:16 21 protecting the AEBCT"?

11:33:18 22 A. Yes.

11:33:19 23 Q. That's The Brockman Trust?

11:33:20 24 A. Yes.

11:33:21 25 Q. If we can look at paragraphs four and five.

11:33:31 1 **A.** Yes.

11:33:31 2 **Q.** "In addition to the surprise lunch with the
11:33:36 3 gift to Ole Miss, I made further six trips to
11:33:40 4 Oxford. Most were at short notice, and all was
11:33:43 5 involved at least three flights there and three
11:33:46 6 flights back, and included always driving from
11:33:50 7 Memphis to Oxford and back.

11:33:52 8 "Now, the trips were made when needed
11:33:55 9 and without hesitation, generally following a call
11:33:57 10 from Melissa telling me she had found more drives,
11:34:00 11 discs, or documents that Don had kept. As you know,
11:34:04 12 I even cut short the trip to Argentina to get back
11:34:08 13 to Oxford to destroy more drives that had been
11:34:11 14 discovered."

11:34:13 15 Then, "By my extraordinary efforts,
11:34:17 16 hugely impacting my family life, I did all that was
11:34:20 17 humanly possible to clean up what Don had left
11:34:23 18 behind. Those efforts meant that we could rest
11:34:26 19 easily any attempt to search Don's home would be
11:34:30 20 fruitless."

11:34:34 21 **A.** Yes.

11:34:35 22 **Q.** Was that reporting back to Mr. Brockman that
11:34:37 23 you had -- concerning the documents that we just
11:34:40 24 discussed?

11:34:41 25 **A.** Not quite. This wasn't me reporting back to

11:34:43 1 Mr. Brockman. This was a performance review for me
11:34:45 2 pitching for a salary increase. My reporting back
11:34:49 3 to Mr. Brockman would have come through other means,
11:34:51 4 through e-mail and so on.

11:34:55 5 Q. Okay. So you are pitching to Mr. Brockman that
11:34:57 6 you deserve a salary increase?

11:34:59 7 A. Yes.

11:34:59 8 Q. And one of the reasons you deserve a salary
11:35:02 9 increase is because you ensured that any attempt to
11:35:05 10 search Don's home would be fruitless?

11:35:07 11 A. Yes.

11:35:10 12 Q. And did that reflect Mr. Brockman's mindset
11:35:14 13 concerning the potential for an investigation in
11:35:17 14 2016?

11:35:18 15 MR. VARNADO: Objection. Calls for
11:35:19 16 speculation.

11:35:19 17 THE COURT: Okay. Foundation, Counsel?
11:35:22 18 How does he know?

11:35:23 19 MR. LANGSTON: I'll rephrase, Your
11:35:25 20 Honor.

11:35:25 21 THE COURT: Okay.

11:35:26 22 MR. LANGSTON:

11:35:26 23 Q. Did Mr. Brockman express to you a concern about
11:35:28 24 a potential investigation in 2016?

11:35:37 25 A. Yes, probably. I don't have a specific

11:35:39 1 instance in mind, but I can't imagine he didn't.

11:35:42 2 But probably is the best I can do, I think.

11:35:45 3 Q. Okay. Did you, in fact, make these trips to
11:35:47 4 Mississippi?

11:35:48 5 A. Yes.

11:35:48 6 Q. And did you, in fact, destroy the documents
11:35:53 7 there?

11:35:54 8 A. Yes, and sometimes I took them away and
11:35:56 9 sometimes I -- Melissa Jones dealt with some as
11:36:01 10 well.

11:36:01 11 Q. How did you destroy them?

11:36:03 12 A. Oh, different things. There was -- there were
11:36:06 13 -- sometimes I had to use a hammer to break some of
11:36:10 14 the media, because it wasn't something I had ever
11:36:13 15 seen before and didn't have a device would go into.
11:36:15 16 So the only way to destroy it was to actually smash
11:36:18 17 it. That sort of thing.

11:36:23 18 Q. Let's go down to Paragraph 7, "I also engaged
11:36:34 19 in doing all I could do to protect the AEBCT over
11:36:38 20 the Robert Smith situation. Further, I was doing
11:36:43 21 all I could do to protect Robert at the same time.
11:36:48 22 I have spent a great deal of time on the road
11:36:51 23 meeting with Robert (so we could talk freely)
11:36:57 24 meeting Carlos Kepke and Sherri Caplan."

11:37:01 25 Did you, in fact, meet with Mr. Smith

11:37:04 1 in 2016?

11:37:06 2 **A.** I believe I did.

11:37:10 3 **Q.** Let's go to Paragraph 18. Could you just
11:37:23 4 briefly describe what you are reporting in
11:37:25 5 Paragraph 18?

11:37:27 6 **A.** At the time this was -- at the time 2016/'17,
11:37:31 7 there was a great deal of time being spent on
11:37:34 8 establishing the -- the funding for the building of
11:37:37 9 an opera theater at Rice University. Bob Yekovich
11:37:43 10 was the dean at The Shepherd School of Music. He
11:37:47 11 was the principal person I had contact with in
11:37:49 12 relation to that.

11:37:49 13 **Q.** You write, "I managed to convey to Bob
11:37:52 14 Yekovich" -- Y-E-K-O-V-I-C-H -- "your wishes without
11:37:57 15 saying anything other than I am the decision maker.
11:38:02 16 Obviously, Bob knows the truth."

11:38:04 17 That's referring to Bob Yekovich?

11:38:06 18 **A.** Yes.

11:38:07 19 **Q.** "But I made it easy for him and David Lebron to
11:38:12 20 maintain the position."

11:38:14 21 **A.** Yes.

11:38:14 22 **Q.** Was, Mr. Brockman, in fact, the decision maker
11:38:17 23 in relation to this?

11:38:18 24 **A.** In relation to building the opera theater, it
11:38:20 25 was Mr. Brockman who gave the direction.

11:38:22 1 Q. Okay. So part of your -- did you view it as
11:38:28 2 part of your job to make it appear that you were the
11:38:33 3 decision maker?

11:38:35 4 A. Well, not in this context, not this instance.
11:38:38 5 Because these conversations with these two people
11:38:41 6 never worked on the basis that I was the decision
11:38:43 7 maker, but that Mr. Brockman was the decision maker.
11:38:45 8 That was many, many hours of Bob Yekovich where Bob
11:38:50 9 would talk to me about how he could best present
11:38:53 10 things to Bob to receive more funding.

11:38:56 11 So in this context, no.

11:38:57 12 Q. In other contexts?

11:38:59 13 A. Well, depends what the context is.

11:39:01 14 Q. Okay. When you say, "I have made it easy for
11:39:03 15 them to maintain the position" --

11:39:06 16 A. Yes.

11:39:06 17 Q. What position are you referring to?

11:39:07 18 A. That the trust has decided to do the funding on
11:39:10 19 this.

11:39:10 20 Q. Okay. Who, in fact, decided to do the funding
11:39:13 21 on it?

11:39:13 22 A. The decision was Mr. Brockman.

11:39:15 23 Q. Let's look at paragraph 26, "This year has seen
11:39:27 24 me further establish my position as the figurehead
11:39:30 25 of the AEBCT and other trusts."

11:39:33 1 **A.** Yes.

11:39:34 2 **Q.** Is that part of what you viewed as your job for
11:39:37 3 Mr. Brockman?

11:39:38 4 **A.** It was -- it was one part of -- well, I was the
11:39:41 5 -- head of the AEBCT. Yes, it was part of it.

11:39:47 6 MR. LANGSTON: I'll offer Exhibit 12.

11:39:49 7 MR. VARNADO: No objection.

11:39:50 8 THE COURT: Subject to stipulation,
11:39:52 9 Government Exhibit 12 is admitted.

11:39:54 10 MR. LANGSTON:

11:39:55 11 **Q.** And I'm going to direct your attention to the
11:39:58 12 summer of 2017. I'm going to mark for
11:40:03 13 identification as Government Exhibit 133.

11:40:27 14 MR. LANGSTON: May I approach, Your
11:40:28 15 Honor?

11:40:28 16 THE COURT: You may approach.

11:40:38 17 MR. LANGSTON:

11:40:39 18 **Q.** Is Government Exhibit 133 one of these
11:40:42 19 encrypted e-mail exchanges between you and
11:40:44 20 Mr. Brockman?

11:40:44 21 **A.** Yes.

11:40:45 22 **Q.** And what's the general topic of this?

11:40:53 23 **A.** It's in relation to the boat, the Albula, and
11:40:59 24 problems I was having with the captain that didn't
11:41:02 25 seem to recognize Mr. Brockman was only a minority

11:41:05 1 owner.

11:41:05 2 Q. So this is -- this is concerning suspicions
11:41:09 3 that the owner has about the ownership?

11:41:11 4 A. Mistaken suspicions.

11:41:16 5 Q. Okay. Let's go to the second page, third
11:41:21 6 paragraph. "I try to use the boat in ways which
11:41:29 7 would suggest that you are not the sole owner, but
11:41:32 8 this is disruptive to my work and family time.

11:41:35 9 Frankly, my efforts are lame since you are, as far
11:41:39 10 as Tom is concerned" -- Tom is the captain?

11:41:43 11 A. Yes.

11:41:44 12 Q. "... the chief decision maker, while I'm an
11:41:47 13 infrequent user who has never slept on the boat, and
11:41:50 14 avoids going out on it. Sophie has been carrying a
11:41:54 15 lot of this for me."

11:41:55 16 A. Yes.

11:41:56 17 Q. That's something you wrote to Mr. Brockman?

11:41:58 18 A. Yes.

11:41:59 19 Q. Okay. We'll go to the final paragraph on that
11:42:02 20 page which continues on, "I would very much like to
11:42:06 21 find a way for you to have full use of the boat
11:42:10 22 year-round, with all costs covered by the
11:42:13 23 foundation. As matters stand today, the risk to you
11:42:16 24 and me is high because of Robert Smith. I do
11:42:21 25 believe we are being monitored. I certainly am.

11:42:25 1 The boat has placed an even bigger target on us."

11:42:29 2 **A.** Yes.

11:42:30 3 **Q.** Is that an accurate statement of your state of
11:42:35 4 mind in June of 2017?

11:42:42 5 **A.** I have to give context to that. Do you want
11:42:45 6 context?

11:42:46 7 **Q.** Sure.

11:42:48 8 **A.** I had spent the 2016 being stopped a number of
11:42:51 9 times coming into the United States. I had some
11:42:54 10 legal advice, and that is what led to my state of
11:42:57 11 mind. In terms of the target, that's what I was
11:43:02 12 referring to.

11:43:04 13 **Q.** You are referring to --

11:43:06 14 **A.** The monitor bit.

11:43:14 15 **Q.** Also --

11:43:16 16 MR. LANGSTON: Well, I'll offer 133,
11:43:17 17 Your Honor.

11:43:18 18 THE COURT: Okay. Any objection?

11:43:19 19 MR. VARNADO: No objection.

11:43:20 20 THE COURT: No objection. Subject to
11:43:21 21 the stipulations, 133 is admitted.

11:43:25 22 THE WITNESS: Do you want this back, or
11:43:26 23 do I leave it here?

11:43:28 24 MR. LANGSTON: I'll take it.

11:43:39 25 **Q.** Also in the summer of 2017, did you learn

11:43:46 1 Bermuda Commercial Bank had frozen a number of
11:43:48 2 accounts associated with the Brockman structures?

11:43:51 3 **A.** I did.

11:43:51 4 **Q.** Did you write a memo to Mr. Brockman expressing
11:43:56 5 concerns you had related to this freeze?

11:43:57 6 **A.** Yes.

11:43:58 7 **Q.** I'll show you Exhibit 18.

11:44:09 8 **A.** Yes.

11:44:09 9 **Q.** Okay. And this is -- this memorandum was one
11:44:13 10 of the documents obtained by the Government in
11:44:15 11 September of 2018?

11:44:21 12 **A.** Yes, I believe so.

11:44:22 13 **Q.** Okay. And you outline sort of a series of
11:44:25 14 problems, and then offer solutions to them?

11:44:27 15 **A.** Yes.

11:44:28 16 **Q.** Let's look at Page 2, problem four.

11:44:37 17 **A.** Yes.

11:44:38 18 **Q.** And you are expressing a concern with the
11:44:43 19 accounts being frozen you won't be able to access
11:44:46 20 legal fees?

11:44:47 21 **A.** Yes.

11:44:47 22 **Q.** Okay. If we can look at the solution.

11:44:54 23 **A.** Yes.

11:44:54 24 **Q.** "We need a hidden fund, which has nothing to do
11:44:58 25 with either me or RTB" -- that's Mr. Brockman?

11:45:01 1 **A.** Yes.

11:45:02 2 **Q.** "... which we could control. Glenn Ferguson, a
11:45:06 3 lawyer in Australia who I know and can trust, would
11:45:08 4 be a prospect to hold funds in a trust and make a
11:45:13 5 'loan' for legal fees and living expenses."

11:45:17 6 **A.** Yes.

11:45:17 7 **Q.** Is the fact that the word loan is in quotes
11:45:19 8 there an indication that would not be a real loan?

11:45:22 9 **A.** It wouldn't have been authentic loan, no.

11:45:29 10 **Q.** Page 3, and we'll go to Paragraph 3. It says,
11:45:40 11 "Even if Robert Smith clears up his problems, the
11:45:42 12 target is well fixed on me, and we need to
11:45:45 13 anticipate that we'll be audited at some point."

11:45:49 14 Is that a reflection of your concern
11:45:52 15 about the Robert Smith investigation potentially
11:45:56 16 bleeding over?

11:45:59 17 **A.** Yes, potentially a concern, yes.

11:46:01 18 **Q.** Okay. Let's look at problem seven. You write,
11:46:18 19 "The target on me is a lot larger than it was some
11:46:22 20 time ago, both because of Robert Smith and the
11:46:26 21 Albula, which also draws a lot of attention."

11:46:30 22 Then you go to the solution, "I need
11:46:32 23 to muddy the waters about where I am located."

11:46:37 24 Then your final line is, "Regulators
11:46:41 25 will come to Bermuda looking for me while we build

11:46:44 1 and maintain connections elsewhere."

11:46:46 2 Does this reflect your concern about
11:46:50 3 the Robert Smith investigation?

11:46:54 4 **A.** I can't say that that's strictly about the
11:46:56 5 Robert Smith investigation. It's just the general
11:46:59 6 concern about -- about, you know, regulators. But I
11:47:04 7 can't say on that particular bit just if it's
11:47:07 8 specifically Robert Smith.

11:47:08 9 **Q.** Okay. When you say, "The target on me is
11:47:10 10 larger because of Robert Smith" --

11:47:12 11 **A.** I see, yeah. Leading back to that, yes.

11:47:14 12 **Q.** Okay. When you say "Muddy the waters about
11:47:17 13 where I am located," that's as to your physical
11:47:20 14 location?

11:47:20 15 **A.** Yes. Old residence -- I suppose more likely
11:47:25 16 old residence, rather than physical location.

11:47:28 17 **Q.** Okay. And then if we can go down to the
11:47:37 18 bullets at the bottom. You write to Mr. Brockman,
11:47:41 19 "We need to be somewhere where I don't have to
11:47:45 20 travel through the US. Even if the fear of
11:47:47 21 detention is lifted, we should be careful about my
11:47:50 22 traveling into the US."

11:47:52 23 Go to the next page. "Certainly I
11:47:59 24 would never do it again with a computer or
11:48:02 25 telephone. If the latter is possible, I could keep

11:48:06 1 all I need at Stuart Yudofsky's office, including a
11:48:09 2 phone."

11:48:10 3 Then your next bullet is, "We need a
11:48:13 4 good cover story as to why I would like to establish
11:48:15 5 new relationships."

11:48:19 6 Is that -- you are trying to come up
11:48:21 7 with something you can tell banks that is different
11:48:23 8 from the reality here?

11:48:24 9 **A.** Well, wouldn't have been different from the
11:48:28 10 reality, because the reality is I'd be there. But,
11:48:31 11 yes, it's just trying to establish why it is that I
11:48:34 12 am moving from Bermuda or spending time somewhere
11:48:36 13 else.

11:48:36 14 **Q.** Then when you write, "This is not our plan, but
11:48:39 15 it would be something readily understood and
11:48:42 16 accepted by all people who work at those places."

11:48:45 17 Does that reflect that what you were
11:48:48 18 going to tell banks wasn't necessarily the reality?

11:48:50 19 **A.** Well, I'm not sure about that. Because in
11:48:52 20 December -- July of 2017, it's the line that you
11:48:55 21 left out about my daughters will have to go to
11:48:58 22 school outside of Bermuda, and I wished to be nearer
11:49:01 23 to them. That was something true. That was
11:49:03 24 something we were already planning.

11:49:04 25 **Q.** So why do you tell Mr. Brockman, "That is not

11:49:07 1 our plan"?

11:49:08 2 **A.** I'm saying that part of it is actually
11:49:12 3 accurate, but that's something we started already,
11:49:14 4 talked about already.

11:49:15 5 **Q.** Okay.

11:49:15 6 **A.** It wasn't our plan. It hadn't been decided,
11:49:18 7 but it was one of the discussions we were already
11:49:20 8 having.

11:49:20 9 **Q.** Fair to say "That is not our plan" is one of
11:49:23 10 the things you wrote it him?

11:49:24 11 **A.** Yes.

11:49:24 12 **Q.** Okay. I'll offer 18.

11:49:34 13 **MR. VARNADO:** No objection.

11:49:34 14 **THE COURT:** Subject to stipulations,
11:49:36 15 Government Exhibit 18 is admitted.

11:49:38 16 **MR. LANGSTON:** Could I have just a
11:49:40 17 moment, Your Honor?

11:49:40 18 **THE COURT:** Sure.

11:49:56 19 **MR. LANGSTON:**

11:49:56 20 **Q.** At some point, were you able to get the money
11:49:58 21 -- sorry. Did you send this memo to Mr. Brockman?

11:50:03 22 **A.** I did.

11:50:03 23 **Q.** And can we show Exhibit 17. Is this an
11:50:14 24 encrypted e-mail you wrote to Mr. Brockman,
11:50:18 25 attaching the memo?

11:50:19 1 **A.** Yes.

11:50:19 2 **Q.** What did he respond?

11:50:21 3 **A.** "I concur with all of these."

11:50:26 4 MR. LANGSTON: Offer 17.

11:50:28 5 MR. VARNADO: No objection.

11:50:29 6 THE COURT: Subject to stipulation, 17
11:50:30 7 is admitted.

11:50:31 8 MR. LANGSTON:

11:50:31 9 **Q.** Were you ever able to get the money unfrozen?

11:50:34 10 **A.** It took quite a long time, but, yes.

11:50:37 11 **Q.** What did you do with the money after it was
11:50:39 12 unfrozen?

11:50:39 13 **A.** Some went back to the entities, some went to a
11:50:43 14 charitable gift, and some went to secure my
11:50:46 15 three-year termination fund that had been
11:50:49 16 accomplished by Mr. Brockman.

11:50:50 17 **Q.** Did you tell Mr. Brockman you would use some of
11:50:52 18 the money to secure your three-year termination
11:50:54 19 fund?

11:50:54 20 **A.** No.

11:50:54 21 **Q.** I'm going to turn your attention to August of
11:50:56 22 2018. Did you receive a call from Mr. Kepke in
11:51:01 23 August of 2018?

11:51:03 24 **A.** Yes.

11:51:03 25 **Q.** What did he tell you?

11:51:04 1 **A.** He told me that some -- my recollection is FBI
11:51:08 2 agents had just executed a search warrant on his
11:51:11 3 home -- where his office is. They had just left.

11:51:14 4 **Q.** And did he tell you -- did he mention whose
11:51:19 5 names were mentioned in the warrant?

11:51:20 6 **A.** He mentioned Mr. Brockman's name was in the
11:51:23 7 warrant, my name, and some other names I had never
11:51:25 8 heard of before.

11:51:26 9 **Q.** After learning your name and Mr. Brockman's
11:51:28 10 name had been written in the warrant, what did you
11:51:30 11 do?

11:51:30 12 **A.** I contacted Mr. Brockman and told him.

11:51:32 13 **Q.** And what was Mr. Brockman's reaction to being
11:51:35 14 told that his name was in the warrant in Mr. Kepke's
11:51:39 15 house?

11:51:39 16 **A.** I'm sure it was over the phone, but as best I
11:51:42 17 can tell he was surprised. I mean, it's -- it's
11:51:45 18 hard to read exactly the reaction, but certainly
11:51:48 19 concerned.

11:51:49 20 **Q.** Did you continue to talk to Mr. Brockman in the
11:51:54 21 days after the Kepke warrant?

11:51:56 22 **A.** I did.

11:51:56 23 **Q.** And describe his level of concern in those
11:52:00 24 phone calls.

11:52:01 25 **A.** He was concerned about it. You know, concerned

11:52:04 1 to know what was happening, whether there were any
11:52:07 2 developments.

11:52:07 3 Q. Was that as rattled as you had ever seen him?

11:52:12 4 A. Yes.

11:52:12 5 Q. Had Mr. Brockman given you a standing
11:52:14 6 instruction on what to do in a circumstance like the
11:52:17 7 Kepke warrant?

11:52:18 8 A. Yes.

11:52:18 9 Q. What was that instruction?

11:52:19 10 A. To go to George Hani of Miller & Chevalier.
11:52:26 11 He's a partner at that firm.

11:52:27 12 Q. You said -- after your house was searched
11:52:33 13 September 2018, what did you do?

11:52:35 14 A. I waited until fairly early in the morning, and
11:52:38 15 waited for a reasonable hour and contacted Mr. Hani.

11:52:42 16 Q. Shortly after you spoke to -- or the weeks
11:52:45 17 after you spoke to Mr. Hani, is that when you handed
11:52:49 18 over the hard drive to the US Government?

11:52:52 19 A. It is.

11:52:53 20 MR. LANGSTON: Nothing further, Your
11:52:55 21 Honor.

11:52:55 22 THE COURT: Okay. Cross-examination?
11:52:59 23 We'll get started for about 15 minutes or so. One
11:53:03 24 second. Before you get started with the
11:53:07 25 cross-examination. We'll get started for about

11:53:21 1 15 minutes or so, and then break around 12:15 and
11:53:26 2 take an hour for lunch.

11:53:28 3 THE WITNESS: Your Honor --

11:53:28 4 THE COURT: You need a break?

11:53:30 5 THE WITNESS: I'm in your hands
11:53:31 6 completely, but don't know if anybody has informed
11:53:33 7 you. We thought we'd be in evidence on Monday. I
11:53:36 8 have a flight to England this afternoon, but I can
11:53:40 9 -- I'm in your hands and I can change that flight if
11:53:43 10 need be.

11:53:44 11 THE COURT: Well, we probably need to
11:53:45 12 take a lunch break at some point in time. Let's
11:53:48 13 continue on to about 12:15. We can break for
11:53:51 14 about -- let's say 45 minutes, instead of our usual
11:53:55 15 hour, and be back at one o'clock.

11:53:56 16 That work for everyone?

11:53:58 17 MR. VARNADO: That'll be fine with us,
11:54:00 18 Your Honor.

11:54:00 19 THE COURT: Works for the Prosecution?

11:54:01 20 MR. LANGSTON: Yes, Your Honor.

11:54:02 21 THE COURT: Okay. Great.

11:54:04 22 THE WITNESS: Thank you, Your Honor.

11:54:04 23 CROSS-EXAMINATION

11:54:04 24 BY MR. VARNADO:

11:54:09 25 Q. Good afternoon. My name is Jason Varnado, and

11:54:12 1 I represent Bob Brockman. As you indicated, you are
11:54:14 2 a cooperating witness for the Government in this
11:54:17 3 case; correct?

11:54:17 4 **A.** Yes.

11:54:17 5 **Q.** And you are individual one listed in the
11:54:19 6 indictment?

11:54:19 7 **A.** Yes.

11:54:19 8 **Q.** And on September 5th, as we talked about, your
11:54:21 9 home was searched by the Bermuda Police Services in
11:54:26 10 2018?

11:54:27 11 **A.** Yes.

11:54:27 12 **Q.** Okay. In that same month, your attorneys made
11:54:31 13 a proffer to the Government?

11:54:33 14 **A.** Yes.

11:54:34 15 **Q.** And you agreed to provide documents that you
11:54:37 16 had stored in an undisclosed location, but only if
11:54:40 17 the Government provided you with immunity; is that
11:54:43 18 right?

11:54:43 19 **A.** That's not the quote -- that's not the way I --
11:54:46 20 I handed everything over to my lawyers to give -- to
11:54:49 21 hand over.

11:54:50 22 **Q.** Okay. But as part of an immunity arrangement,
11:54:53 23 you agreed to provide information?

11:54:54 24 **A.** No, that -- the immunity arrangement came
11:54:57 25 later. I had already given the instruction to my

11:54:59 1 lawyers before that.

11:55:00 2 Q. Is that including to access information and
11:55:03 3 documents in storage lockers and other locations?

11:55:06 4 A. We hadn't gotten to that stage at that point.

11:55:08 5 Q. That came later. Okay. You did, in fact,
11:55:11 6 receive immunity from the Government on October 2,
11:55:14 7 2018?

11:55:14 8 A. Yes.

11:55:15 9 Q. Okay. That's less than one month after your
11:55:17 10 home was raided in Bermuda?

11:55:18 11 A. Yes.

11:55:18 12 Q. All right. And I know Mr. Langston referenced
11:55:24 13 your grand jury testimony. You testified before the
11:55:27 14 grand jury, which was sitting in San Francisco three
11:55:29 15 times in this matter; correct?

11:55:31 16 A. Yes.

11:55:31 17 Q. That's where the case was originally filed
11:55:33 18 before it was moved to Houston?

11:55:34 19 A. Yes.

11:55:35 20 Q. And each time you were sworn in to the grand
11:55:38 21 jury, you promised to tell the truth; correct?

11:55:40 22 A. Yes.

11:55:40 23 Q. And at the outset of each time you testified,
11:55:45 24 the prosecutors reminded you that your immunity
11:55:47 25 agreement did not include covering you for perjury,

11:55:52 1 as you mentioned at the beginning of your testimony?

11:55:54 2 **A.** That's correct.

11:55:54 3 **Q.** The Government told you that your answers need
11:55:57 4 to be truthful and complete?

11:55:59 5 **A.** Yes.

11:55:59 6 **Q.** That if you provided false testimony in any
11:56:02 7 capacity, you could be prosecuted?

11:56:03 8 **A.** Yes.

11:56:04 9 **Q.** And you understand that you have to tell the
11:56:07 10 truth, whether it helps the Department of Justice or
11:56:10 11 whether it may help Mr. Brockman?

11:56:11 12 **A.** Absolutely.

11:56:12 13 **Q.** Okay. In other words, you can't take sides,
11:56:15 14 it's just the truth?

11:56:16 15 **A.** Yes.

11:56:17 16 **Q.** All right. And were you truthful in every
11:56:19 17 statement that you made before the grand jury?

11:56:21 18 **A.** I was truthful, based on what I was asked, yes.

11:56:25 19 **Q.** Okay. You understand that the requirement to
11:56:29 20 be truthful is not just in the grand jury testimony,
11:56:32 21 but also in your various meetings that you have had
11:56:35 22 with the United States Government over the last
11:56:37 23 three years?

11:56:38 24 **A.** Yes.

11:56:38 25 **Q.** And, in fact, Mr. Smith -- lead prosecutor --

11:56:43 1 warned you of this when you first met with the
11:56:44 2 Government October 4th of 2018?

11:56:46 3 **A.** I believe it was Mr. Pittman.

11:56:49 4 **Q.** Fair. Mr. Pittman admonished when you sat down
11:56:56 5 to be interviewed that same obligation in your
11:56:58 6 immunity agreement to tell the truth applied there?

11:57:00 7 **A.** Yes.

11:57:01 8 **Q.** And not just in the grand jury?

11:57:03 9 **A.** Yes.

11:57:03 10 **Q.** By the information we've received -- I think we
11:57:06 11 have a record of you sitting down with the
11:57:08 12 Government at least 17 times prior to most recently
11:57:12 13 this weekend; does that sound about right to you?

11:57:14 14 **A.** I believe.

11:57:17 15 **Q.** And I think we tallied the start and stop times
11:57:20 16 of those various interviews from the memos returned
11:57:24 17 to us, and came up with 60 hours of meeting with the
11:57:26 18 Government attorneys or agents. Is there any reason
11:57:30 19 to quibble with that?

11:57:31 20 **A.** No.

11:57:34 21 **Q.** When did you land in the United States for
11:57:36 22 purposes of your testimony today?

11:57:37 23 **A.** Last Friday.

11:57:38 24 **Q.** Okay. Been here a little while?

11:57:41 25 **A.** Yes.

11:57:41 1 Q. And how many meetings have you had with the
11:57:45 2 prosecutors or the agents since you've landed in
11:57:47 3 Houston last Friday?

11:57:48 4 A. I met with them on Saturday, and I met with
11:57:53 5 them on Sunday morning.

11:57:54 6 Q. How long was your meeting on Saturday?

11:57:56 7 A. I think we finally kicked off around the 11:30
11:57:59 8 mark and finished, I think, 5:30 or 6:00.

11:58:03 9 On Sunday -- I don't have a clear
11:58:06 10 recollection on these times, but on Sunday I think
11:58:08 11 it was about 9:00 a.m. We might have finished
11:58:11 12 around 11:00 or 11:30.

11:58:13 13 Q. Okay. No other discussions with the
11:58:15 14 prosecution team since Sunday?

11:58:17 15 A. Not that I can recall, no.

11:58:20 16 Q. Okay. We'll come back to one of those meetings
11:58:23 17 later in your testimony. And so, is it your
11:58:26 18 testimony that you have been truthful in every
11:58:28 19 statement that you have made in the -- in the
11:58:31 20 meetings that you have had with the United States
11:58:33 21 Government?

11:58:33 22 A. I've tried to give truthful answers to
11:58:35 23 everything I've been asked.

11:58:36 24 Q. Including in your meeting this weekend?

11:58:38 25 A. Yes.

11:58:39 1 Q. All right. So I would like to talk a little
11:58:42 2 bit right now about what you may or may not know
11:58:45 3 about Mr. Brockman's current health condition.
11:58:48 4 Before today, I'm correct that the last time you saw
11:58:52 5 Mr. Brockman in person was June of 2018?
11:58:54 6 A. That's my recollection.
11:58:56 7 Q. Okay. And I guess just sitting here today,
11:59:01 8 does he look different to you today than he did in
11:59:04 9 June of 2018?
11:59:05 10 A. Very different.
11:59:06 11 Q. How so?
11:59:08 12 A. A lot thinner. Nowhere near as upright.
11:59:15 13 Q. And so, that's 2018. Based on our reading of
11:59:20 14 the memorandums that the Government shared with us,
11:59:22 15 your last meeting in person with Mr. Brockman prior
11:59:25 16 to June of '18 was two times in 2017. I believe it
11:59:31 17 was October of '17 in Argentina?
11:59:33 18 A. That sounds correct.
11:59:33 19 Q. And prior to that, in Bermuda in June of 2017,
11:59:37 20 around the time of the America's Cup (phonetic)?
11:59:40 21 A. Yes, that's correct.
11:59:41 22 Q. So before today, over the last five years of
11:59:44 23 2017, 2018, 2019, 2020, and now almost all the way
11:59:49 24 through 2021, you've actually laid eyes --
11:59:52 25 personally in his presence -- three times on

11:59:55 1 Mr. Brockman?

12:00:01 2 **A.** Three times, and one very brief appearance of

12:00:04 3 Mr. Brockman on screen after he was indicted, but

12:00:06 4 that was of course impossible to pick anything up.

12:00:08 5 **Q.** Okay. Are you referring to you actually tuned

12:00:12 6 into and observed Mr. Brockman --

12:00:14 7 **A.** I did for that one.

12:00:15 8 **Q.** One moment. Can't talk over each other so the

12:00:18 9 court reporter gets it. You are just saying that

12:00:20 10 you tuned into Mr. Brockman's initial appearance out

12:00:23 11 in San Francisco, and were able to observe by video;

12:00:27 12 that's the only other time?

12:00:28 13 **A.** That's the only other time.

12:00:29 14 **Q.** And as I understood it, you have not spoken on

12:00:32 15 the phone with Mr. Brockman since the search of your

12:00:35 16 home on September 5th of 2018?

12:00:38 17 **A.** I'd say even slightly earlier than that,

12:00:41 18 probably towards the end of August of 2018.

12:00:43 19 **Q.** So sometime between the search of Mr. Kepke's

12:00:46 20 home and office in August of 2018, and the search of

12:00:49 21 your home would be the last time that you spoke with

12:00:52 22 Mr. Brockman?

12:00:53 23 **A.** That's correct.

12:00:53 24 **Q.** Okay. And so, other than what you might have

12:00:56 25 learned through public records in these proceedings,

12:00:58 1 you have no personal knowledge of Mr. Brockman's
12:01:00 2 current physical health condition?

12:01:02 3 **A.** None.

12:01:03 4 **Q.** And other than again what you might have
12:01:05 5 learned by reading material in this proceeding, you
12:01:08 6 have no knowledge -- personal knowledge of
12:01:10 7 Mr. Brockman's current cognitive functioning?

12:01:12 8 **A.** None at all.

12:01:13 9 **Q.** All right. I want to go back in time to -- you
12:01:17 10 obviously spent time working with Mr. Brockman from
12:01:19 11 2004 through 2018. When you first met Mr. Brockman,
12:01:23 12 would you describe him as somebody who was hard
12:01:25 13 working?

12:01:25 14 **A.** Extremely hard working.

12:01:27 15 **Q.** He worked long hours?

12:01:28 16 **A.** Yes, seven days a week.

12:01:30 17 **Q.** Was he physically fit?

12:01:31 18 **A.** Very strong.

12:01:32 19 **Q.** Did you agree he was very careful with his
12:01:35 20 health?

12:01:35 21 **A.** Yes, absolutely.

12:01:36 22 **Q.** I think in some of your performance reviews, he
12:01:39 23 mentions it's important to maintain diet and
12:01:42 24 exercise, sort of as a recommendation to follow that
12:01:44 25 he did?

12:01:45 1 **A.** I think he took -- he took pity on me as I
12:01:48 2 wasn't anywhere as fit as him, and he was so much
12:01:51 3 older, yes.

12:01:52 4 **Q.** And at some point in time when you were still
12:01:54 5 seeing Mr. Brockman in person, did you start to
12:01:56 6 notice physical changes in how he appeared to you?

12:02:00 7 **A.** Yes, in the last -- going up towards the end of
12:02:05 8 2018. So the last time I saw him in June of 2018 --
12:02:09 9 probably in the two or three years up to that time.

12:02:11 10 **Q.** So in the 2015 to 2018 time period, just
12:02:16 11 generally describe what it is you start to observe
12:02:18 12 in Mr. Brockman's physical appearance?

12:02:20 13 **A.** Um, in terms of his physical appearance, um, he
12:02:23 14 was slightly bent. I noticed that he was bent a
12:02:25 15 little more at the waist than he used to be. Bob
12:02:29 16 always walked in a very upright, very fit way.

12:02:32 17 I noticed that he was slightly more
12:02:34 18 bent. I noticed something that struck me quite --
12:02:37 19 quite strongly, and I think it might have been -- my
12:02:42 20 memory was it was in Argentina and walking through
12:02:45 21 the hallway in the hotel in Argentina. So it would
12:02:48 22 have been October of 2017, being struck by
12:02:51 23 Mr. Brockman stepping over a threshold -- he was
12:02:55 24 very, very careful in stepping over a threshold.
12:02:57 25 That actually was quite striking as he took that

12:03:00 1 step.

12:03:01 2 Q. Why was that so striking? Did you know him to
12:03:03 3 be somebody who exercised and ran long distances?

12:03:06 4 A. You know, the idea of stepping over a threshold
12:03:09 5 in a doorway causing problems I had never seen
12:03:11 6 before.

12:03:11 7 Q. That was back in October --

12:03:13 8 A. In my recollection it was in the hotel in
12:03:15 9 Argentina that it struck me.

12:03:16 10 Q. So even when you weren't seeing Mr. Brockman in
12:03:19 11 person, would you have occasion to speak with him by
12:03:21 12 phone or maybe even Skype or video call or anything
12:03:26 13 like that?

12:03:26 14 A. Yes, regularly.

12:03:27 15 Q. Did you notice anything in that time period --
12:03:29 16 in those 2015 to 2018 time period about
12:03:32 17 Mr. Brockman's ability to maintain his focus on
12:03:35 18 phone calls and video calls?

12:03:37 19 A. Yes. To put it in context, yes, I did notice
12:03:39 20 it. Do you want me to elaborate?

12:03:42 21 Q. Please.

12:03:42 22 A. To put in context, as I said earlier,
12:03:45 23 Mr. Brockman was a very hard-working person, and
12:03:47 24 would do seven-day weeks, long hours every day.
12:03:50 25 Both Mr. Jones and myself had to fit in around his

12:03:55 1 availability, because he's running a large company
12:03:58 2 of thousands of employees.

12:04:01 3 Particularly for me, given where I
12:04:03 4 was the time differences, you -- I would have
12:04:06 5 conversations with Mr. Brockman. He'd be focused.
12:04:08 6 He'd be -- he'd be -- he'd never repeat himself.
12:04:12 7 His memory was -- his memory was perfect. His
12:04:16 8 recall was excellent, and he could work long, long
12:04:21 9 hours. 10:00 or 11:00 at night his time was never a
12:04:24 10 problem.

12:04:24 11 Q. That started to change over time?

12:04:25 12 A. Then I noticed in the '15/'16/'17 period things
12:04:35 13 started to change. His focus wasn't what it used to
12:04:38 14 be. He would drift and talk about other matters.
12:04:41 15 He would latch to more enjoyable topics, fishing
12:04:45 16 instead of work. I noticed that he would tell me
12:04:50 17 the same story again and again. This wasn't
12:04:52 18 something Bob used to do in the past --

12:04:54 19 Q. So that was unusual --

12:04:56 20 A. That was unusual, and it -- if you know Don
12:04:58 21 Jones, Don would repeat the same story many times.
12:05:02 22 That was something Bob and I had spoken about in
12:05:05 23 relation to Don, and here I was seeing it a little
12:05:07 24 bit with Bob.

12:05:09 25 He didn't work as near the long

12:05:11 1 hours he used to. I noticed that from time to time
12:05:16 2 -- at times it would be -- he would say, "I've got
12:05:19 3 to go. Dorothy wants to watch a TV show."

12:05:22 4 At times it was clear -- we Skyped
12:05:25 5 and other things -- it would be clear Dorothy would
12:05:28 6 come to the door and is calling Bob away. Things
12:05:30 7 like that.

12:05:31 8 Q. That were unusual prior to that time period?

12:05:33 9 A. I noticed it. I certainly noticed the
12:05:35 10 differences.

12:05:36 11 Q. Did you ever -- did you ever have an occasion
12:05:39 12 where Mr. Brockman began to fall asleep during
12:05:41 13 meetings?

12:05:42 14 A. Yes, a couple of times he fell asleep.

12:05:44 15 Q. Was that unusual?

12:05:45 16 A. When I was embarrassed of my client sometimes
12:05:49 17 do that, but, no. It was unusual. It was very
12:05:52 18 unusual.

12:05:52 19 Q. At the time, did you attribute these changes to
12:05:56 20 old age, or what was your assessment at the time?

12:05:58 21 A. At the time it was old age. Put it down to old
12:06:01 22 age.

12:06:01 23 Q. Did you think Mr. Brockman was fabricating
12:06:04 24 these physical changes and -- and diminished
12:06:07 25 capacity at the time you were observing him?

12:06:10 1 A. Not at all.

12:06:11 2 Q. Any doubt what you were observing was real?

12:06:14 3 A. None whatsoever.

12:06:15 4 Q. You spoke with people at Reynolds and Reynolds
12:06:16 5 about some of the physical and mental changes you
12:06:19 6 were observing in Mr. Brockman; correct?

12:06:21 7 A. I did.

12:06:21 8 Q. Who were some of those people?

12:06:23 9 A. Definitely Robert Burnett. I might have
12:06:27 10 mentioned -- I know I spoke to Robin Gilliland, who
12:06:31 11 is in the legal department. These were people I was
12:06:33 12 closest to inside the company.

12:06:34 13 Q. With Mr. Burnett and your conversations with
12:06:36 14 him, did he share your concerns about Mr. Brockman's
12:06:39 15 physical and mental decline?

12:06:41 16 MR. LANGSTON: Objection. Hearsay.

12:06:42 17 THE COURT: Hearsay. Response?

12:06:47 18 MR. VARNADO: Just asking what he
12:06:48 19 experienced from Mr. Burnett in terms of his
12:06:52 20 impression of whether he shared the same view of
12:06:54 21 Mr. Brockman.

12:06:54 22 THE COURT: I thought asked whether he
12:06:57 23 shared -- one second. Yeah, with Mr. Burnett in
12:07:07 24 your conversations, did he share your concerns about
12:07:11 25 Mr. Brockman's physical and mental health. The

12:07:13 1 answer is yes or no, but what he shared would be
12:07:16 2 hearsay. So respectfully, objection overruled.

12:07:20 3 MR. VARNADO:

12:07:20 4 Q. Did he share your concern?

12:07:21 5 A. Yes.

12:07:22 6 Q. And same with Mrs. Gilliland?

12:07:24 7 A. Yes.

12:07:24 8 Q. Any indication -- as to Ms. Gilliland, did her
12:07:29 9 husband suffer from Parkinson's disease?

12:07:31 10 A. Yes --

12:07:33 11 MR. LANGSTON: Objection, Your Honor.
12:07:34 12 Counsel is trying to introduce the views of
12:07:38 13 Ms. Gilliland and Mr. Burnett without calling them as
12:07:42 14 witnesses here, subject to cross-examination.
12:07:43 15 That's hearsay.

12:07:44 16 THE COURT: Yeah. At this point -- you
12:07:46 17 can ask him what their general impressions were,
12:07:50 18 based on his observations and their reactions.
12:07:52 19 That's not hearsay. That's great.

12:07:54 20 If you are getting into what they
12:07:56 21 thought about a medical condition, the only way he
12:08:01 22 could know that is if they told him that, and that
12:08:04 23 would be hearsay. So respectfully, objection
12:08:06 24 sustained.

12:08:07 25 MR. VARNADO: Okay.

12:08:07 1 Q. Note Mr. Burnett was actually on the
12:08:10 2 Government's witness list, but --

12:08:12 3 MR. LANGSTON: Move to strike.

12:08:13 4 THE COURT: Well, when he comes, we can
12:08:15 5 talk to him.

12:08:17 6 MR. VARNADO:

12:08:17 7 Q. At the time, did you have any belief or
12:08:19 8 understanding or awareness that Mr. Brockman was
12:08:23 9 suffering from Parkinson's?

12:08:24 10 A. No.

12:08:24 11 Q. Did you understand that to be different today?

12:08:27 12 A. I understand it to be different from what I've
12:08:30 13 read, but that's all.

12:08:32 14 Q. Okay. So let's shift gears and talk a little
12:08:36 15 bit about the AEBCT, which unfortunately I will
12:08:39 16 probably use that term a few times. You were the
12:08:42 17 trustee of the A. Eugene Brockman Charitable Trust;
12:08:46 18 correct?

12:08:46 19 A. I was a director of the trust -- of the
12:08:49 20 trustee.

12:08:49 21 Q. Fair. The trust company was St. John's?

12:08:53 22 A. Yes.

12:08:54 23 Q. You were director at St. John's?

12:08:56 24 A. Yes.

12:08:56 25 Q. Which acted as trustee for the AEBCT?

12:08:59 1 **A.** Right.

12:09:00 2 **Q.** Okay. Just to be clear, the AEBCT is a
12:09:06 3 discretionary, charitable trust?

12:09:08 4 **A.** Yes.

12:09:08 5 **Q.** And there's nothing improper about a
12:09:13 6 discretionary, charitable trust as an entity under
12:09:16 7 Bermuda law?

12:09:17 8 **MR. LANGSTON:** Objection. Asking for
12:09:19 9 the witness's legal opinion as to Bermuda law.

12:09:23 10 **THE COURT:** Well --

12:09:25 11 **MR. VARNADO:** I think they spent an
12:09:26 12 hour and a half asking about activities as trustee,
12:09:30 13 and he is a lawyer.

12:09:31 14 **MR. LANGSTON:** Your Honor, about his
12:09:32 15 observations, tasks that he did. He is asking
12:09:35 16 whether it is legal in Bermuda to have a certain
12:09:39 17 type of trust.

12:09:40 18 **THE COURT:** I think this witness can
12:09:42 19 answer, since he was the trustee. I mean, he can
12:09:44 20 answer as to his understanding of whether or not it
12:09:46 21 was legal or not legal. So objection's overruled.

12:09:50 22 **MR. VARNADO:**

12:09:50 23 **Q.** So again, I'll rephrase it so the record's
12:09:52 24 clear. Under Bermuda law, there's nothing
12:09:56 25 inherently improper or illegal about a

12:09:59 1 discretionary, charitable trust like the AEBCT?

12:10:02 2 **A.** That's correct.

12:10:03 3 **Q.** The same is true under US law?

12:10:05 4 **A.** I don't know about US law.

12:10:07 5 **Q.** Well, either way -- this was -- you believed
12:10:09 6 the AEBCT to be a lawful structure, just in and of
12:10:13 7 itself how it was established?

12:10:14 8 **A.** I still do, yes.

12:10:15 9 **Q.** And still do?

12:10:16 10 **A.** Yes.

12:10:16 11 **Q.** All right. Now, distributions from trusts like
12:10:19 12 the AEBCT to individual beneficiaries, to persons
12:10:24 13 would not be consistent with charitable purposes of
12:10:27 14 such a trust; correct?

12:10:30 15 **A.** Under this particular trust deed, it wouldn't
12:10:33 16 -- wouldn't have been consistent with a charitable
12:10:35 17 gift. That's right.

12:10:36 18 **Q.** Okay. And I just want to be clear that the
12:10:38 19 AEBCT never made a distribution to an individual
12:10:43 20 beneficiary, correct?

12:10:45 21 **A.** In all of my time, I never saw such a
12:10:47 22 distribution. And in my review of the trust
12:10:50 23 records, I never saw such a distribution.

12:10:52 24 **Q.** And that includes Mr. Brockman?

12:10:54 25 **A.** That's correct.

12:10:55 1 Q. In fact, you told the Government this weekend
12:10:57 2 that Mr. Brockman, and I quote, "Never took a cent
12:11:01 3 out of the trust," the AEBCT?

12:11:03 4 A. That's correct.

12:11:04 5 Q. Now, the most significant asset of the AEBCT is
12:11:07 6 Reynolds and Reynolds; correct?

12:11:08 7 A. Yes.

12:11:09 8 Q. That's a US-based company?

12:11:10 9 A. Yes.

12:11:11 10 Q. And it's owned by Universal Computer Systems
12:11:15 11 Holdings; right?

12:11:16 12 A. Yes.

12:11:16 13 Q. You are aware that entity files US taxes?

12:11:18 14 A. Yes.

12:11:19 15 Q. And the same for Reynolds and Reynolds; it
12:11:22 16 files US taxes also?

12:11:23 17 A. Yes.

12:11:24 18 Q. And then, again, Dealer Computer Services,
12:11:27 19 which is in the hierarchy, that is also a US entity?

12:11:30 20 A. Yes.

12:11:31 21 Q. That files US taxes?

12:11:32 22 A. Yes.

12:11:32 23 Q. All right. So while you were a director at
12:11:35 24 St. John's Trust Company, during the last eight
12:11:38 25 years or so is when you had the director position --

12:11:40 1 last eight years of your tenure?

12:11:42 2 **A.** That's correct.

12:11:43 3 **Q.** From 2010 to 2018. Again, at the time you were
12:11:48 4 the director, you believed that trust structure to
12:11:49 5 be lawful; correct?

12:11:50 6 **A.** Yes.

12:11:51 7 **Q.** And you also believed that the activities that
12:11:54 8 you conducted on behalf of the trust were also
12:11:59 9 lawful?

12:11:59 10 **A.** Yes.

12:12:00 11 **Q.** All right. And again, as your role as the
12:12:04 12 director of St. John's trustee of the AEBCT; is that
12:12:08 13 fair?

12:12:08 14 **A.** Yes.

12:12:08 15 **Q.** Okay. And as a trustee to the -- to the AEBCT,
12:12:13 16 you had fiduciary obligations to the trust and to
12:12:18 17 the related entities that you managed?

12:12:19 18 **A.** Yes.

12:12:20 19 **Q.** All right. And I -- I believe it's your
12:12:22 20 testimony and your view, even sitting here right
12:12:25 21 today, that you met your fiduciary obligations with
12:12:28 22 respect to the AEBCT?

12:12:28 23 **A.** I believe I did.

12:12:29 24 **Q.** All right. And, in particular, you satisfied
12:12:33 25 your obligations -- fiduciary obligations in

12:12:35 1 connection with charitable giving; correct?

12:12:37 2 **A.** Yes.

12:12:37 3 **Q.** All right. And in some instances, did other
12:12:41 4 individuals make recommendations to the
12:12:43 5 organizations that should receive charitable giving
12:12:46 6 from the trust?

12:12:46 7 **A.** Yes.

12:12:48 8 **Q.** Would one of those examples be Robert Burnett,
12:12:50 9 Reynolds's CFO that suggested a scholarship program
12:12:56 10 be set up at Texas A&M?

12:12:59 11 **A.** Yes.

12:12:59 12 **Q.** And that particular scholarship was designed to
12:12:59 13 promote students going into the science, technology,
12:13:21 14 engineering and math; correct?

12:13:21 15 **A.** Yes.

12:13:22 16 **Q.** And that scholarship program was funded by the
12:13:24 17 trust?

12:13:24 18 **A.** That's correct.

12:13:25 19 **Q.** And is it fair to say that the AEBCT
12:13:28 20 participated in substantial charitable giving?

12:13:31 21 **A.** Yes.

12:13:31 22 **Q.** And I'm going to run through a few and see if
12:13:34 23 you agree with me. Around 20 million from the AEBCT
12:13:39 24 to Rice University in 2008 for the Brockman Hall of
12:13:45 25 Physics?

12:13:45 1 **A.** My recollection around -- I thought 22, but,
12:13:47 2 yeah. Twenty or twenty-two, yeah.

12:13:49 3 **Q.** Ballpark estimates are fine for this. A pledge
12:13:52 4 of \$85 million to Rice University in 2014 for an
12:13:56 5 opera theater called the Brockman Theater?

12:13:58 6 **A.** Yes. Again, I think it might have been more,
12:14:00 7 but, yes.

12:14:01 8 **Q.** At least \$4 million to the Centre College in
12:14:04 9 Kentucky for an athletic field?

12:14:06 10 **A.** Yes.

12:14:06 11 **Q.** An additional \$22.5 million to the Centre
12:14:11 12 College in 2010 for the Brockman Residence Commons?

12:14:14 13 **A.** Yes, that was \$22,000,000.

12:14:16 14 **Q.** And \$25 million to the Baylor College of
12:14:19 15 Medicine in 2010?

12:14:20 16 **A.** Yes.

12:14:21 17 **Q.** We're going to come back to that date, because
12:14:23 18 few questions about that that were confusing. And
12:14:26 19 again, to the Texas A&M scholarship program, around
12:14:30 20 \$12- to \$15 million, beginning around 2018 for
12:14:33 21 what's called the Brockman Scholars?

12:14:34 22 **A.** Yes.

12:14:36 23 **Q.** And I'll run through a couple more. There were
12:14:39 24 \$6 million to form the Jefferson Scholars associated
12:14:43 25 with the University of Virginia?

12:14:45 1 A. Yes.

12:14:45 2 Q. Again --

12:14:46 3 A. Not to form, sorry. It was \$6 million gift to
12:14:50 4 establish a share of colonial history and fellowship
12:14:53 5 to go with the chair.

12:14:55 6 Q. Okay.

12:14:55 7 A. It was money to the Jefferson Scholars.

12:14:58 8 Q. Not to form it, but as a donation?

12:15:01 9 A. That's correct.

12:15:02 10 Q. Thank you. \$6 million to the UT Health Science
12:15:06 11 Center?

12:15:06 12 A. Yes.

12:15:06 13 Q. All right. And then I think \$5 million to
12:15:09 14 various doctors in Bermuda?

12:15:11 15 A. Yes.

12:15:11 16 Q. Would those be some of the donations that --

12:15:14 17 A. Um, there was -- I think -- my recollection was
12:15:16 18 two -- two and a half million dollars, and it was
12:15:19 19 John Hopkins for the doctor who was a Bermudian
12:15:21 20 doctor. But then over the years, many smaller
12:15:25 21 donations -- many, many years to Bermuda charities.

12:15:27 22 Q. You went through some of what I asked you in
12:15:30 23 your grand jury testimony; correct?

12:15:31 24 A. Yes.

12:15:31 25 Q. And I think that the testimony there was that

12:15:33 1 the trust has given or committed around \$200 million
12:15:37 2 in charitable donations during the time period you
12:15:40 3 were involved as the trustee?

12:15:42 4 **A.** Yes.

12:15:42 5 **Q.** All right. And the trust made these donations
12:15:47 6 because they're consistent with the charitable
12:15:49 7 purposes of the trust?

12:15:49 8 **A.** That's correct.

12:15:50 9 **Q.** And as we mentioned, several of these
12:15:53 10 donations, they absolutely reference the Brockman
12:15:55 11 name?

12:15:55 12 **A.** Yes.

12:15:56 13 **Q.** There's the Brockman Hall of Physics and the
12:15:59 14 Brockman Theater at Rice University?

12:16:00 15 **A.** Yes.

12:16:01 16 **Q.** The Brockman Commons at Centre College?

12:16:04 17 **A.** Yes.

12:16:05 18 **Q.** And the Brockman Scholars at Texas A&M?

12:16:08 19 **A.** Yes.

12:16:08 20 **Q.** So it was publicly available Mr. Brockman was
12:16:11 21 connected, in some way, to this charitable giving?

12:16:14 22 **A.** Yes.

12:16:19 23 MR. VARNADO: Your Honor, it's 12:15 if
12:16:20 24 you would like me to take a break.

12:16:20 25 THE COURT: That would be great. Let's

12:16:22

1 be back at one o'clock. If there's issues, let me

12:16:25

2 know. We're trying to move along as quickly as we

12:16:27

3 can.

4 **(WHEREUPON, THE PROCEEDINGS WERE RECESSED AT 12:16**

5 **P.M.)**

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C E R T I F I C A T E

I hereby certify that pursuant to Title 28,
Section 753 United States Code, the foregoing is a
true and correct transcript of the stenographically
reported proceedings in the above matter.

Certified on 11/17/2021.



Sean Gumm, RPR, CRR

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